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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Humble Oil and Refining Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on October 2, 1970, and the order denying rehearing entered on October 22, 1970.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is unofficially reported in 1969 A. M. C. 453 and is printed infra, p. A1. The opinion of the Court of Appeals for the Third Circuit is reported in 431 F. 2d 1119 and is printed infra, p. A16. The order denying appellant's petition for a rehearing is printed infra, p. A23.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 2, 1970, infra, p. A22. A timely Petition for Reargument was filed on October 16, 1970. The order denying rehearing was entered on October 22, 1970, infra, p. A23. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED.

1. Can obligations imposed by the rules governing the navigation of vessels be avoided by substituting a navigator's judgment of speeds, distances, and the point where approaching vessels' courses will intersect or cross for the mandates of the navigation rules requiring immediate and affirmative avoiding action?

2. Where one vessel involved in a collision with another has, by its own evidence, shown she breached not only one but several governing navigation rules, can she escape sharing responsibility for the ensuing collision where it cannot be shown such faults could not have contributed to the collision, and, indeed, were necessarily responsible for precipitating the negligent act of the other vessel found by the courts below?

STATUTES INVOLVED.

The statutory provisions involved are the Inland Rules of the Road, 28 Stat. 672, as amended, 33 U. S. C. A. § 151-232 and the Pilot Rules for Inland Waters issued by the Commandant of the Coast Guard, as authorized under 39 stat. 102, 46 U. S. C. A. § 157, 33 C. F. R. § 80-80.38. The relevant provisions governing the navigation of vessels as they approach each other, designed to prevent maritime disaster, appear infra, pp. A24-A28.

STATEMENT OF THE CASE

On the morning of December 16, 1982, in the lower reaches of Delaware Bay, a collision occurred between two loaded oil tankers, the MS ATLANTIC SUN and the MS ELMO NEW YORK (hereafter SUN and ELMO). The resulting collision damage caused SUN's owner to file a petition for exoneration from or limitation of liability. ELMO's owner, the petitioner herein, filed a claim in that action. These proceedings stem from that litigation.

In the open waters of Delaware Bay, SUN was proceeding outbound at 11.7 knots and ELMO inbound at 14 knots. First by radar observation and then visually, the vessels navigated with reference to each other over a distance of some three miles from 0301 hours until 0320 (0320.5 SUN time), the moment of collision. At that time SUN was moving right and ELMO left under hard over rudders from courses of 157° and 010° respectively, SUN having commenced turning 600 and ELMO 300 yards from the point of their intersecting courses. SUN was moving right for a period of two minutes and ELMO left for one and one-half minutes before collision, during which time the vessels closed the 0.6 of a mile which had separated them, fortunately striking more to stem and thereby avoiding what would otherwise have been not only a greater maritime but also an ecological disaster as well.

Despite having been treated below as the resolution of a "complex factual array", this matter involved no real dispute respecting the positions or actions of these vessels at all material times leading up to the collision. Indeed, ELMO was entitled to adopt one of SUN's own exhibits, P-28, depicting the positions, speeds, and courses of SUN from 0302.5 and ELMO from 0304. Since that exhibit lends itself to a better understanding of the issues and eliminates some explanation, it has been reduced in size and attached opposite the next page. SUN is shown moving south on her

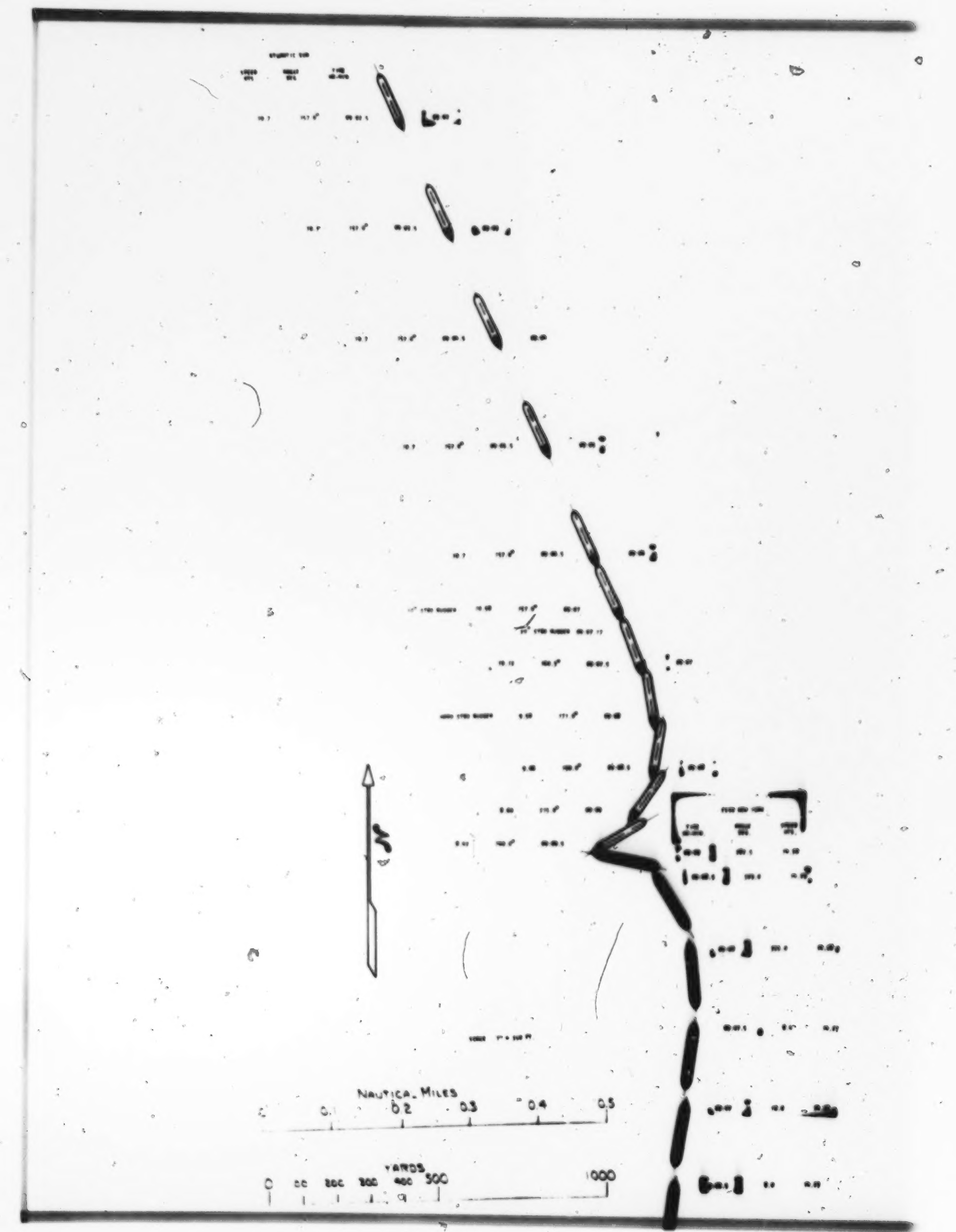
course of 157° and Esso towards SUX on her material courses of 000° and 010°. They are then shown commencing and continuing their turns into collision.

The half-minute time elements with corresponding vessel headings do not show up clearly in reduced scale, but that information is not essential to the issues here. It is the relationship of these vessels to each other during the approach, a relationship completely ignored below, which governs their respective duties and the issues presented. That relationship, as will be shown in the discussion of the navigation rules, is best explained by SUX's expert who prepared the chart, Mr. Suarez:

> Q. Commencing at, let us say, 0905 or even 0906 for both vessels, if we projected their courses ahead, would they intersect?
>
> A. Yes.
>
> • • •
>
> Q. The ATLANTIC SUX would cross ahead of the Esso NEW YORK?
>
> A. Yes.
>
> Q. The vessel which had the other on its starboard end [sic.] [side] would cross ahead?
>
> A. That is right. (81a)

Obviously, until each vessel was turning right and left respectively, each had to be observing the opposite side of the other—SUX being faced by the port or left side of Esso and Esso being faced by the port side of SUX. As will be explained, that relationship is the traffic signal of the sea and cannot be ignored, as it has been below, in direct conflict with the precepts of this Court and the rulings of other circuits.

While visibility was reduced by falling snow, SUX sighted Esso at a little better than a mile and Esso sighted SUX at 0.6 of a mile. Upon visual sighting, SUX judged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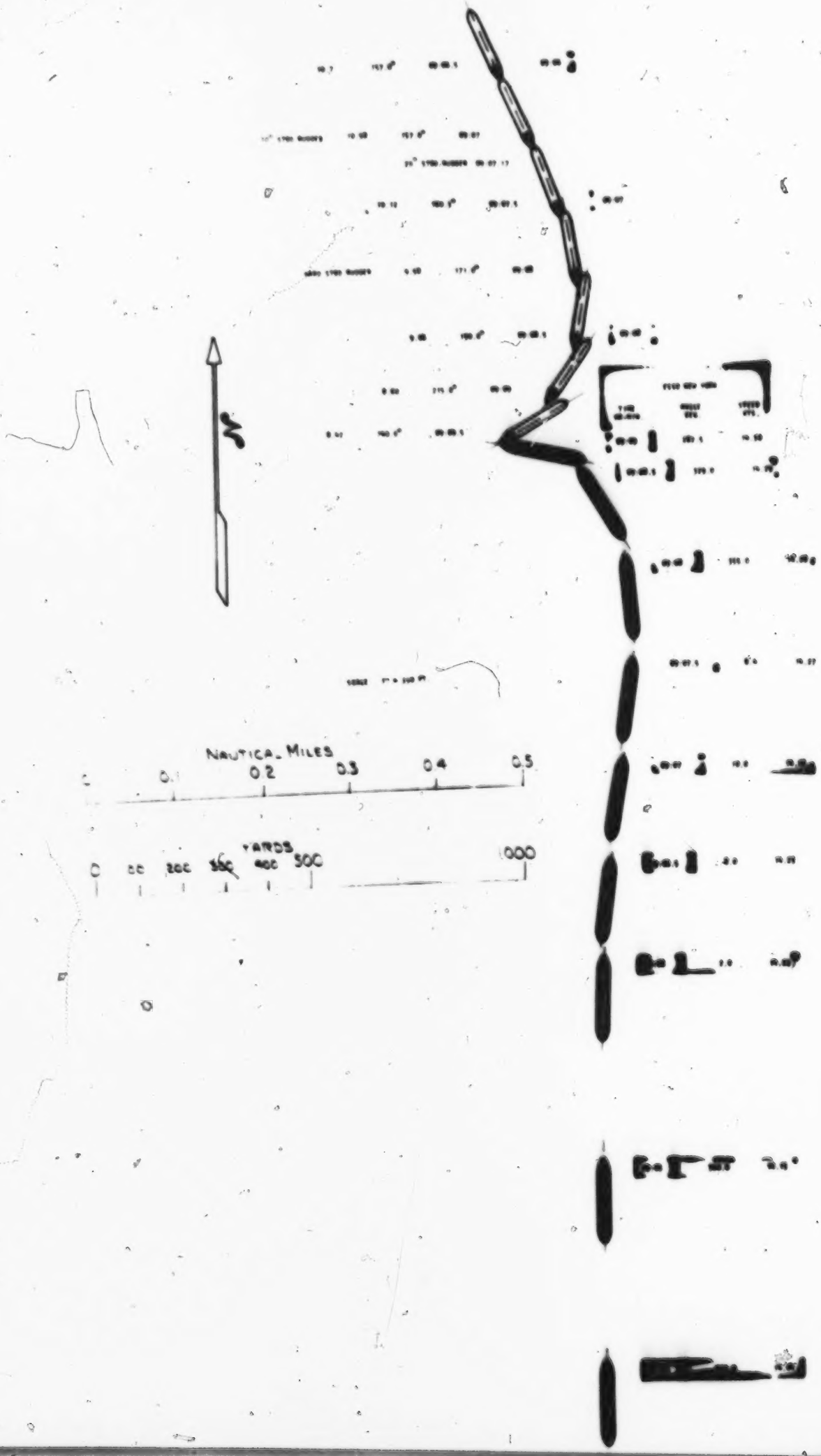
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that by holding her 157° course and speed, the vessels seemingly being on reciprocal headings, there would be a safe starboard to starboard passing, allegedly confirming prior radar observations. She therefore proceeded ahead without signal.

Thereafter, between 0906 and 0907, when the vessels were about ¾ of a mile apart, Esso's heading was changed from 069° to 010°, thereby postponing the point where the vessels' courses would intersect. Upon completing that movement, and when the vessels were only 0.6 of a mile apart, SUN was sighted visually by Esso, on a heading which crossed her course line. Esso then commenced turning left to avoid what her navigator felt was an inevitable collision unless something was done. Esso's sighting of SUN took place five vessel positions back from the point of collision on SUN's exhibit and, as clearly shown, SUN's corresponding position was on a heading across Esso's course line.

One-half minute before Esso's left turn SUN had commenced a right turn but had only moved some 3° when sighted by Esso. SUN's action was allegedly brought about by the observation of Esso's slight course change to the right. Although SUN thereafter observed Esso's left swing at about 0908, one and one-half minutes before collision, she neither stopped nor reversed until 0909, a half minute before collision, when her engines were put emergency full astern.

Before the trial court, Esso urged that the positions of these vessels during their approach required SUN to immediately undertake affirmative action to comply with her duties, actions she admittedly intended to ignore but for Esso's later course change to the right, and that even when she tardily recognized there was "risk of collision" the actions taken did not fulfill the obligations imposed on her by law. Finally, it was urged these admitted breaches

of statutory duties required Sun to show that they not only did not but could not have been a contributing cause of the collision.

The trial court, after analyzing distances, times, and what course changes could or could not be seen during intervals of less than a minute, disposed of all issues by resolving the factual questions of what courses would have permitted these vessels to slip by each other, concluding Esso's left turn was the sole proximate cause of the collision. Not once, although properly describing Sun as the burdened vessel, did Judge Troutman give recognition to the statutory duties imposed upon her. Indeed, his opinion condones intentional statutory breaches. Moreover, in direct conflict with the mandates of this Court, he settled the issue of the proof required of a vessel in breach of a statutory duty by ignoring it completely.

On appeal, the issues were again treated as the resolution of a "complex factual array" and references to the navigation rules, although acknowledged to exist, were dismissed as "dedicated advocacy" and the opinion below was affirmed because the fact findings were deemed to be not "clearly erroneous".

Since we consider the courts to be so greatly in error for their failure to apply or even discuss the statutory duties of vessels approaching each other in the position described, indeed because they substituted a navigator's judgment for what must be deemed affirmative obligations, we will not burden this Court with other errors respecting speeds, lookouts, and radar interpretation, although they cry out for relief as well. The primary concern must be for the strict adherence to the basic rules designed to prevent maritime collisions. If the function of judicial review is reduced to the mere determination of who struck whom and when, the very purpose of the navigation rules must be effectively eliminated.

REASONS FOR GRANTING THE WRIT.

1. Sanctioning by the Courts Below of Sun's Failure to Timely or Completely Respond to Her Duties as a Burdened Vessel Necessarily Conflicts With Prior Decisions of This Court and Those of Other Circuits.

The governing statutory rules, supplemented by the Coast Guard's Pilot Rules, provide a ready means for navigators to determine their obligations when vessels approach in different situations, 33 U. S. C. A. § 203; Pilot Rule 80.4. Each has an obligation to move right and pass port to port when approaching head and head or end on. That duty is defined as arising when each vessel can see the masts of the other in line or nearly in line with its own, i.e., reciprocal courses. It is expressly provided that such a passing or even one for a starboard to starboard passing which requires a two whistle agreement between the vessels, ". . . does not apply by day to cases in which a vessel sees another ahead crossing her own course."

There can be no doubt SUN and Esso approached each other on crossing courses from the time they began to navigate with reference to each other and after visual sighting. In that situation, the statutory navigation rules provide that the vessel [SUN] which has the other on her own starboard side must (1) avoid crossing ahead of the other, 33 U. S. C. A. § 207, (2) keep out of the way, 33 U. S. C. A. § 204, and (3) if necessary, slacken her speed or stop or reverse, 33 U. S. C. A. § 208. The foregoing precise directions are not only repeated in the Pilot Rules, §§ 80.02 and 80.09, but the burdened vessel is further admonished to ". . . keep out of the way . . . by directing her course to starboard so as to cross the stern of the other steam vessel . . .". Pilot Rule 80.7(a).

Without doubt, the approach of these vessels involved "risk of collision" as defined in the rules. This is not only

implicit in the findings below which recognized they had to navigate with respect to each other, but the circumstances which bring that consideration into play has been lucidly analyzed by the Second Circuit in *Ocean Marine Limited v. United States Lines Company*, 300 F. 2d 496 (2 Cir. 1962). There the court was dealing with the possible contributing fault of a vessel not even involved in the actual collision. A tanker, following in the path of a tug and tow, was caused to collide with the tow because the tow's direction was suddenly changed across the tanker's path when her navigator became alarmed that a third vessel, on a crossing course where she was burdened, was not complying with her obligation to stay out of the way. The lower court's decision holding the tanker solely at fault was reversed with directions to determine the contributing fault of the third vessel which failed to ". . . avoid crossing ahead . . ." of the privileged vessels involved in the collision. Because that opinion expresses the concepts so well, following the guidelines of this Court, we quote from it at length:

> "The Rules of the Road prescribe certain clear-cut obligations for vessels in a crossing situation. Once they become operative no deviation from their dictates is permitted. The rules are familiar to all masters and pilots, and each of the vessels in a crossing situation may presume that the other will comply with the rules. They are designed to prevent collisions; any vessel whose violation of a rule leads to a collision is held liable for damages caused by it. Of course they govern navigation only from the time the need for precaution begins. New York and Liverpool U. S. Mail S. S. Co. v. Rumball, 62 U. S. 372, 21 How. 372, 16 L. Ed. 144. The question of when such necessity arises is to be determined by application of objective

standards; the fact that the vessel under scrutiny did not perceive the need for crew matters not at all. The Johnson, 76 U. S. 146, 153, 9 Wall. 146, 19 L. Ed. 610; Griffin on Collision 20-21 (1949).

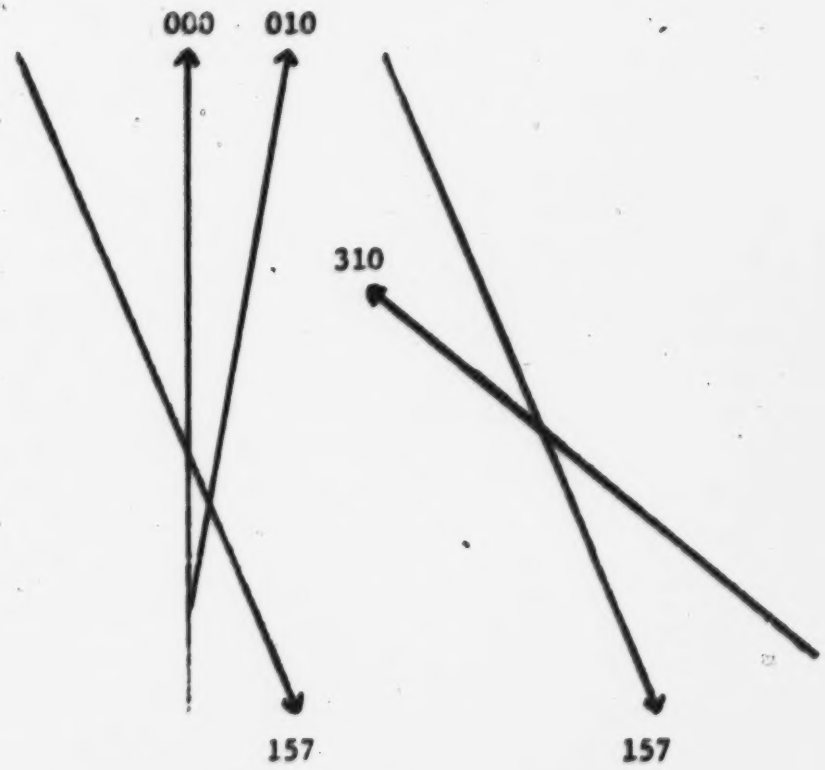
Since the rules are designed to prevent the risk of collision as well as collision itself, it is not necessary for a collision to be imminent or even probable before the obligations imposed by them accrues. The courts have expressed this concept in various ways. Said Judge Addison Brown: '[T]here is danger or risk of collision whenever it is not clearly safe to go on.' The Arrania, D. C. S. D. N. Y., 29 F. 98, 123. While Judge Learned Hand put it thus: ' "[R]isk of collision" does not mean certainty of collision; but only that prudence demands that the navigators shall watch each other's navigation, and be prepared to do whatever safety may demand.' Socony Vacuum Transp. Co. v. Gypsum Packet Co., 2 Cir., 153 F. 2d 773, 776. In short, a situation may involve risk of collision before there is actual danger, but 'when the relation between the vessels is such that danger may shortly arise, if the rules are not obeyed.' Griffin on Collision 23 (1949). Once vessels enter into such a potentially dangerous relationship, their obligations are fixed.

• • •

For these reasons, a finding that collision is not *probable* clearly does not preclude a conclusion that the situation involves the risk of collision."

A situation almost identical to the facts here was dealt with by Judge Learned Hand, a jurist with perhaps more experience in resolving the issues arising from maritime disasters than any other, in *Socony Vacuum Transportation Co. v. Gypsum Packet Co.*, 153 F. 2d 773, 776 (2 Cir. 1946).

In these same waters, Delaware Bay, the privileged vessel was outbound on a course of 157° and the burdened inbound on a 310° heading. We have diagramed the courses of Sun and Esso to the left below and the comparable situation dealt with by Judge Hand to the right.



In discussing the aspects of the vessels to each other at first sighting, it was held they "... were already so situated as 'to involve risk of collision' *although they would not have collided had each kept her course and speed.*" (Emphasis ours). The privileged vessel was criticized for a slight 8° course change to the right during the interval of approach, but the burdened vessel was held solely at fault for, among other things, not keeping out of the privileged vessel's way and for not stopping and reversing as required. There, the

lower court also commented that the burdened vessel "... should never have attempted to cross ahead ... for there was ample room to proceed up the easterly side." 57 F. Supp. 531, 537.

The decisions below would overrule these stringent doctrines so plainly set forth by the rules themselves and the precedents interpreting them. Indeed, that the requirements of the rules were so greatly misconceived is underscored by the following excerpt from the opinion of the Court of Appeals:

> There was logic to the [SUN's] expectation of starboard to starboard passing: SUN was on a southeastward heading; ESSO was coming from the west shore and was proceeding northwardly, making for the channel entrance.

This collision occurred some three miles below the channel entrance and there was no basis in fact or fantasy for SUN to make such an assumption, let alone to have it judicially condoned. There was no communication between the vessels and for all SUN knew, ESSO might have been testing out her engines before proceeding to her destination. Some might say, although probably just her captain, that it was logical for the TOMMY CANYON to take a short cut to her destination. Such assumptions cannot be tolerated in the navigation of vessels. It is just such assumptions, logical or otherwise, the rules are designed to prevent. When navigators are alerted that their vessels' paths are crossing because each sees the opposite side of the other, the traffic light of the sea, each must be assured their duties will be carried out and that neither will be required to guess at the other's intentions. Otherwise, the rules become empty words without the force of law.

The decision below must not be sanctioned. An obvious crossing, with the duties thereby imposed, cannot be trans-

lated into a starboard to starboard passing, particularly without signal. Sun intended to cross ahead of Esso, her aspect was still crossing when sighted by Esso, and Esso was justifiably alarmed as confirmed by the fact both vessels started left and right within less than one half minute of each other. Had Sun complied with any of her duties, including the reversal of her engines, Esso's criticized left turn might not have been undertaken or she might have had time to counteract that turn. In either event, Esso's criticized actions abundantly establish Sun's faults in that she ignored the presence of "risk of collision" a term defined as meaning a navigator must avoid situations where ". . . if either ship exercised bad judgment there might have been a collision." *Ocean Marine Limited*, *supra*, 500.

2. The Decision of the Trial Court, as Affirmed on Appeal, Is Contrary to the Decision of This Court in the Pennsylvania, 19 Wall (86 U. S.) 125.

To insure strict compliance with the rules intended to prevent collisions, this Court stated the following principal in *The Pennsylvania*, 19 Wall (86 U. S.) 125, 136 (1873):

> "But when, as in this case, a ship at the time of a collision, is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the statute."

The Pennsylvania, *supra*, held a sailing vessel at fault when, contrary to the navigational rules, a bell was being

sounded instead of a fog horn. This conclusion was reached despite evidence to the effect that not only could the bell be heard further than the fog horn, but also that the other vessel, upon hearing the bell, turned into collision instead of away from it.

In *Lie v. San Francisco & Portland S. S. Co.*, 243 U. S. 291 (1917), a vessel was held at fault for failing to stop her engines when the fog signal of a vessel was first heard forward of her beam even though the evidence indicated she was going astern at the time of collision because of subsequent reductions in speed. The rule has been consistently applied in a legion of cases, including this very same Third Circuit. Despite the gross faults of one vessel which practically included taking direct aim at the other under full speed, the other was tarred with blame because the court inferred doubt in her navigator's mind when he repeated a passing signal instead of blowing the danger signal. *Petition of Oskar Tiedemann and Co.*, 289 F. 2d 237 (3 Cir. 1961).

Why this long standing, and obviously beneficial, rule has been treated as non-existent below is unfathomable. Its resurrection cannot await a maritime disaster with more tragic consequences. There is no way Sun can establish her faults as the burdened vessel *could not* have contributed to the collision. At the very least, her actions brought about the exercise of Esso's "bad judgment". Moreover, that the trial court absolved Sun for failing to have a bow lookout and to blow fog signals with the statement that their absence "did not" contribute to the collision, indicates that the issue was not considered at all. He was required to find that these statutory faults *could not* have been a cause of the collision.

As noted in *Diesel Tanker F. A. Verdon, Inc. v. Stakeboat No. 2*, 340 F. 2d 465, 468 (2 Cir. 1965):

> "Thus, where the breach of duty is statutory, it is the *impossibility* that it may have been one of the

causes of the collision, not the forgivability of one which did, that affords relief from liability for that violation."

Sun's flagrant breaches of her clear statutory duties, as noted heretofore, were proximate and substantial causes of the casualty and must be reviewed in the context of this Court's guiding standards which have been a matter of record for nearly a century.

3. The Questions Presented Are of the Utmost National and International Importance.

Statutory construction, including the navigation rules, has always been and must continue to be deemed of the utmost national importance. Their construction, and that of Pilot Rule 80.16(h) in particular, caused Mr. Justice Frankfurter to reverse a decade of refraining from participation in the substantive disposition of cases arising under the Federal Employers' Liability Act and The Jones Act. In *Kernan v. American Dredging Co.*, 355 U. S. 426, 441 (1958), he explained as follows:

> "This is a case which involves a serious question of construction of a statute of nationwide importance. Such questions of construction are among the most important issues for final determination by this court. . . ."

Larger vessels are traveling at faster speeds, and without doubt they will get larger and faster in the future. Strict adherence to the rules cannot be minimized. The often dramatic and tragic consequences of maritime disasters are common knowledge, affecting not only those directly involved in the manning and operation of colliding

vessels but multitudes of innocent third persons and the ecology as well.

Judicial enforcement of the rules designed to prevent such casualties is mandatory. Here those governing principles have been ignored and substituted in their stead we have a hindsight determination of courses, speeds, and distances showing Sun might have squeezed by for a misconceived starboard to starboard passing.

The trial court's approval of a so-called safe passage in reduced visibility at ⅛ of a mile or 750', when early avoiding action would obviously have eliminated all risk of collision, must be deemed incredible. The error was compounded when support of that conclusion was enlisted by comparing the distances between vessels passing each other in marked confined channels, the highways of our inland waters. We have the rules because, as here, vessels most often must travel in open waters.

The navigation rules are designed to prevent "risk of collision" not just collisions. That basic principle has been overlooked throughout these proceedings and the sanctioning of navigation based upon unfounded assumptions as to another's intentions must necessarily have an adverse effect on the future conduct of navigators. Such a conclusion is clearly contrary to the settled law and the ruling of Judge Learned Hand in *A. H. Bull S. S. Company v. United States*, 34 F. 2d 614, 616 (2 Cir. 1929):

> "Masters who choose to divine the purposes of other vessels and keep on, may avoid the charge of overcaution, but they take their chances. If they escape, well and good; if they fail, their owners pay."

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

James F. Young,
Raymond T. Letulle,
Counsel for Petitioner.

Appendix.

FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW AND ORDER.

TROUTMAN, *J.* FEBRUARY 25, 1969

On December 16, 1962, the ATLANTIC SUN, owned by the Sun Oil Company, and the ESSO NEW YORK, owned by the Humble Oil and Refining Company, collided in the Delaware Bay. Substantial damage resulted to both vessels.

Sun Oil Company filed a petition seeking exoneration from and limitation of liability. Humble Oil and Refining Company thereafter filed its answer and claim of damages. Thus, the owner of each vessel seeks recovery from the other for losses and damage sustained as a result of the collision.

Prior to the collision the ATLANTIC SUN was proceeding outbound from Marcus Hook and the ESSO NEW YORK was proceeding inbound after taking a pilot on board at Lewes, Delaware.

The case was ably tried by experienced counsel who have submitted complete briefs and memoranda together with requests for findings of fact and conclusions of law. Extended testimony was taken and other evidence submitted, all of which has been carefully reviewed. Accordingly, the Court makes the following:

FINDINGS OF FACT.

As to the Accident.

1. Petitioner, Sun Oil Company, was at all pertinent times a New Jersey Corporation and the owner and operator of the tank ship ATLANTIC SUN.

2. Humble Oil and Refining Company, claimant, in these proceedings, was at all pertinent times a Delaware Corporation and owner and operator of the tank ship Esso New York.

3. The Atlantic Sun was a diesel-powered tanker built in 1943 by the Sun Shipbuilding and Dry Dock Company, Chester, Pennsylvania. She was 547' long, 70'2" in beam.

4. The Esso New York was a steam turbine reduction gear tank ship built in 1950. She was 602'2" in length, 827" in beam.

5. (a) The Atlantic Sun departed from Marcus Hook at 0348, December 16, 1962. Prior to departure, all navigation gear was tested and found to be in good working order, including a Raytheon radar machine and gyrocompass. It lacked a course recorder which is not necessary to navigation in the Delaware River and Bay. Lack of such a recorder did not contribute to the accident.

(b) The Atlantic Sun had a full complement of officers and men and all officers were duly licensed. Her master's license contained a radar endorsement indicating that he had successfully completed both basic and advanced courses in the use and interpretation of radar.

6. At departure, the master was at the conn in the wheelhouse assisted by the second officer, the watch officer, and the third officer and helmsman. The master was acting as his own pilot and was piloting the vessel from departure until collision under his First Class Pilot's license issued by the United States Coast Guard, under statutes and regulations of the United States, allowing him to pilot vessels of any gross tonnage in the Delaware Bay and River. The duties of master and pilot do not and did not interfere with each other.

7. The master, the mate and the helmsman were in the wheelhouse during the events leading up to the collision. The Third Engineer was in charge of the engine room assisted by an oiler.

8. On departure from Marcus Hook visibility was estimated to be between 8 and 10 miles. By the time the ATLANTIC SUN reached Miah Maull Lighthouse in Miah Maull range at 0748, visibility had closed slightly to about 8 miles.

9. Those in charge of the navigation on the ATLANTIC SUN had determined that the gyro had a 1° easterly error, which is not unusual for large ocean-going vessels and for which correction was duly made.

10. The ATLANTIC SUN proceeded down river without incident, passing Brown Shoal buoy #7 at 0859 which buoy marks the seaward entrance to the dredged channel. When abeam of #7, the ATLANTIC SUN's engines were turning 73 rpms and the vessel was making 10.7 knots over the ground, the current was flooding at about 1 knot, the wind was from the northwest, Force 2 (about 3-5 miles per hour), and the visibility had reduced to about 3 miles.

11. Meanwhile, on December 16, 1962, the ESSO NEW YORK was proceeding inbound, having picked up a pilot at the pilot station at or about 0846, at which time she was dead in the water.

12. At all material times, the pilot of the ESSO NEW YORK was being assisted on the bridge by the captain and third mate, a quartermaster was at the helm, and a lookout was posted on the bow.

13. At all material times, the vessel's engines were on full ahead and her speed was increasing as she accelerated after picking up the pilot so that at or about the time of collision she was making a speed of approximately 14 knots.

14. The Esso New York remained on a course of 350° True until 0851.6 when she came right and steadied up on a course of 003° True. She remained on this course until 0859 when she came left to 350°. At 0901.1, the New York came right to a course of 360° True and remained on this course until 0905.7. At this point, she came right, swinging to a heading of 010° True, but never steadied up on this course. Instead, about 0906.7, she had begun to check her swing to the right and came slowly left; by 0908.5 her rudder was placed hard left and she continued swinging to the left until collision at 0909, New York time. The heading of the Esso New York at collision was 282.5° True. There was a half minute time differential between the Sun and the New York, thus 0909 New York time was 0909.5 on the Sun.

15. The pilot of the New York had forgotten or otherwise failed to have with him his portable radio-telephone which is frequently used by Delaware River pilots for instant communication with the pilots of other vessels. The pilot's portable radio-telephone is an aid to navigation used to assist the pilots in determining the intentions of other ships being navigated in their vicinity.

16. The Sun, on the contrary, was equipped with ship to ship radio-telephone, which was in good operating condition, and was used by the master to communicate with the pilot boat which advised him the Esso New York was inbound with a pilot.

17. As the Atlantic Sun passed abeam of buoy #7 at 0859, visibility was about three miles. The radar was operating and set on the 8 mile range. She was steering 156° to make good 157° True. She remained on a course of 157° True until 0907 Sun time, or about 2½ minutes prior to the collision.

18. At about 0901, SUN time, the master of the SUN sighted the NEW YORK on his radar three (3) miles distant bearing about 10° on the starboard bow. Subsequent radar observations indicated that the bearing of the Esso NEW YORK was opening to the right. Therefore, the SUN's master properly concluded that the vessels would safely pass starboard to starboard. Plottings were not made and none were necessary. ATLANTIC SUN's master did not misinterpret his radar.

19. At about 0906, SUN time, radar observations by the SUN's master of the NEW YORK when Esso was about one (1) mile distant, confirmed a safe starboard to starboard passing. Subsequent visual sighting of the Esso NEW YORK confirmed such radar observations.

20. Before a lookout was posted on the bow and fog signals sounded, the Esso NEW YORK was visually sighted from the bridge of the ATLANTIC SUN. The absence of a lookout and the absence of fog signals prior to visual contact did not contribute to the accident.

21. When the Esso NEW YORK was first visually observed by the SUN, she appeared to be on a course about parallel (though not precisely reciprocal) to that of the SUN and heading for #7 buoy at the entrance to Brandywine Range. The vessels were so far to the starboard of each other, that a starboard to starboard passing was safe and practicable. Assuming no change those on the SUN correctly estimated that the vessels would pass starboard to starboard at a distance between ¼ and ⅛ of a mile, a safe passing in the restricted waters of the Delaware Bay. In Brandywine Range, a 1000′ wide channel, vessels meet and pass at full speed with no more than 200 to 500 feet between them.

22. Immediately after the first visual sighting of the NEW YORK, those on the bridge of the SUN observed the NEW YORK coming to her right to a heading which would take her across the track of the ATLANTIC SUN. The NEW YORK's course recorder tracing confirms her right swing and this was observed by those on the ATLANTIC SUN. Upon observing the NEW YORK's change of heading to her right, the SUN sounded a short blast (one second's duration) on her whistle to indicate that she was coming to the right and a 10° right rudder was ordered and executed. The vessels, at this time, were a little over ¾ of a mile apart. About ten seconds later, the ATLANTIC SUN sounded another one second blast on her whistle and ordered a 20° right rudder in order to bring her heading more quickly to the right.

23. At this point, the vessels were clear for a port to port passing, which would have been at a distance of 2 to 3 ship lengths, or about 1500 feet, a safe passing in the restricted waters of the Delaware Bay. At 0908 (SUN time) the SUN went hard right rudder in order to gain maximum clearance between the ships.

24. After executing the hard right rudder, those on the bridge of the SUN observed the NEW YORK swinging rapidly towards them as if on a hard left rudder. The vessels at this time were a little less than .5 of a mile apart. At or about 0909, SUN time, the SUN sounded her danger signal consisting of several short blasts on her whistle and ordered her engines to full astern with an emergency jingle on the engine telegraph. The general alarm was also rung to alert all hands.

25. The starboard bow of the Esso NEW YORK struck the port bow of the ATLANTIC SUN at 0909½, SUN time. The impact destroyed the bow of the ATLANTIC SUN back to the windlass. The starboard anchor let go and ran out to the

end, but the vessel quickly fetched up on the anchor which held the vessel in position. The angle of collision was estimated to be between 40 and 45°. Immediately after impact, the Esso New York continued on her port swing and the starboard quarter of the New York struck the Sun again on the Sun's port quarter. Shortly after the initial impact, the master of the Esso New York ordered full ahead and hard right rudder and moments later the ships cleared each other.

26. As the Atlantic Sun was proceeding outbound at 11.7 knots (see 10th finding of fact, supra) the Esso New York was proceeding inbound at 14.2 knots. Esso New York's pilot first observed the Sun on radar at three or four miles and visually observed the Sun for the first time at .6 of a mile distant. (The helmsman and lookout on the Esso New York made such observation at about 1 mile distant.) Signals given by said lookout were not reported to the pilot.

27. At 0905.7 (New York time) the New York began coming to her right from her prior course of 360° to a heading of 010° at 0907 (New York time). This 10° swing to the right was promptly observed by the Sun. Meanwhile at 0906.8 (New York time) the Esso New York had begun to check her swing to the right, but this left rudder was not perceptible and was not observed by the Sun. By 0907.5 (New York time) the Esso New York was on a heading of 008.4° and slowly swinging to her left. This change of heading to the left of 1.6° between 0907 and 0907.5 (New York time) (0907.5 and 0908 Sun time) was likewise not perceptible and was not observed by the Atlantic Sun. Between 0907.5 and 0908 (Sun time) the vessels were end-on or nearly so.

28. At about 0907.5 (NEW YORK time) the NEW YORK commenced swinging hard left and continued on to hard left until collision at 0909 (NEW YORK time). The SUN perceived this hard left swing within a few seconds, but before 0908 (NEW YORK time). Just prior to collision, the ESSO NEW YORK's engines were ordered full astern. Although this order was promptly acknowledged and executed in her engine room, it could not and did not avoid the collision.

29. At about 0907.5 (NEW YORK time) the SUN had already swung 14° to her right. Had those on the bridge of the ESSO NEW YORK been attentive to their duties and closely watching the SUN, which was on the NEW YORK's port bow, they could and would have observed the SUN's swing to the right. Although the ESSO NEW YORK heading at this moment was 008.4° and swinging slowly to her left, the NEW YORK could and should then have come hard right on her rudder instead of hard left, and the vessels would have passed safely port to port.

30. At 0907.5 (NEW YORK time) the SUN was committed to her right swing, having already turned right 14°. This maneuver could and should have been observed by the NEW YORK navigators. By 0907.5 (NEW YORK time) the SUN was *in extremis* and could have done no more.

31. The hard left rudder of the ESSO NEW YORK put her *in extremis*.

32. After the collision, the ESSO NEW YORK stood by to render assistance until released. She then proceeded to Paulsboro, New Jersey, her intended destination to discharge cargo.

33. After the collision, the ATLANTIC SUN remained at anchor until the evening of December 16, 1962. The ATLANTIC SUN returned to Marcus Hook, arriving December 17, 1962.

34. Prior to the collision and at all times pertinent thereto the ATLANTIC SUN was proceeding at a prudent and moderate rate of speed and able to stop within one-half (½) the distance of her visibility. (This finding is made independently of a "Stop Test" made on a sister ship, the Sabine Sun, on December 15, 1966, but is confirmed by the results of such test although we find it unnecessary to make specific findings with respect to said "Stop Test".)

35. For some time prior to the collision, the navigators of the ESSO NEW YORK were less than completely attentive to the approach of the ATLANTIC SUN as disclosed by radar.

36. Shortly prior to the collision, the navigators of the ESSO NEW YORK were less than completely attentive in failing to more quickly visually observe the SUN.

37. Immediately prior to the collision, the navigators of the ESSO NEW YORK were imprudent in ordering a hard left rudder.

38. The sole substantial cause of the collision was the ESSO NEW YORK's left rudder when the vessels were clear for a safe port to port passing.

39. The ATLANTIC SUN was seaworthy when leaving Marcus Hook and immediately prior to the collision with the ESSO NEW YORK.

40. The ATLANTIC SUN is entitled to exoneration from liability and is exonerated.

41. The ESSO NEW YORK is solely responsible for the collision.

As to Damages.

42. Upon completion of the damage survey of the ATLANTIC SUN, the vessel was a constructive total loss. The

parties have stipulated the ATLANTIC SUN's recoverable cost of repairs in the amount of $353,888.80.

43. The cost of retaining the vessel's crew from December 16, 1962 to December 29, 1962, in the amount of $16,687.72 was reasonably incurred as it was necessary to discharge the cargo and make the vessel ready for survey.

44. The cost of engine supplies in the stipulated amount of $4,562.10 consumed between December 16 and December 29, 1962, was likewise reasonably incurred in preparing the vessel for survey and possible repairs.

45. The cost of deck supplies consumed between December 16 and December 29, 1962, was stipulated at trial as reasonably incurred in the amount of $182.40.

46. To complete the damage survey of the ATLANTIC SUN the removal of her cargo and the disposition of same was required. To thus dispose of cargo and in mitigation of possible damages and by reason of this collision, the Sabine Sun was diverted for 7.42 days in order to load and carry the ATLANTIC SUN's cargo from Marcus Hook to Florida. Based on the *December 1962* operating cost of the Sabine Sun, Sun Oil Company incurred an additional out-of-pocket expense in the amount of $31,772.44 by reason of diverting the Sabine Sun. The expense of diverting the Sabine Sun was a cost actually and reasonably incurred by Sun Oil Company as a result of this collision and is allowed in the amount of $31,772.44.

47. Charter hire allegedly lost to the ATLANTIC SUN by reason of the collision does not, under the circumstances here involved, constitute a recoverable item of damage.

48. The total provable damages of petitioner, Sun Oil Company, which should be paid by claimant, Humble Oil and Refining Company, are $407,003.55, together with interest and costs as hereinafter provided.

DISCUSSION.

From the foregoing findings of fact it is evident that the navigator of the ATLANTIC SUN was at all times attentive to the position and location of the ESSO NEW YORK, changing course to meet changing conditions as they occurred and reacting to a somewhat variable and erratic course followed by the ESSO NEW YORK. The courses of the latter and the changes therein (see 14th finding of fact) seem to have been made without particular reference or regard to the approaching ATLANTIC SUN except, of course, the hard left shortly prior to collision which was made in an attempt to avoid collision, but was ordered in panic and bad judgment. Thus, the fault of the ESSO NEW YORK is self-evident.

Claimant vigorously contends that the ATLANTIC SUN was also at fault suggesting that, as the burdened vessel, she proceeded at something more than a moderate speed, that she failed to sound fog signals, that she failed to post a lookout, that she failed to properly use her radar and that she was otherwise at fault in doing too little too late. We have carefully considered claimant's contentions, have carefully reviewed the evidence and cannot, in good conscience, reach the conclusion urged by the claimant. The overwhelming weight of the evidence seems to conclusively establish that the ATLANTIC SUN, as the burdened vessel, did all that could reasonably and prudently be done, under the circumstances, to avoid the collision and that she was not at fault.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction over the parties and the subject-matter.

2. The navigation of ATLANTIC SUN and the Esso New York is governed by the United States Inland Rules of Navigation.

3. The Esso New York was guilty of negligent interpretation of radar, by failure to originally conclude that, without further course changes, the vessels would pass safely to starboard at a reasonable distance.

4. Thereafter, the Esso New York negligently failed to continue a starboard passing, but, instead, without signal, negligently converted the approach to a port to port passing by changing course to the right.

5. When the Esso New York had crossed the ATLANTIC SUN's bow, was clear for a port to port meeting and passing (the ATLANTIC SUN having, in the meantime, prudently altered her course to the right), the Esso New York again negligently altered course, this time to her left, toward the ATLANTIC SUN, notwithstanding the New York had observed the SUN on her port bow.

6. Those in charge of the navigation of the Esso New York were inattentive, careless and negligent, in incorrectly interpreting the radar when the vessels were some distance apart, in failing to correctly appraise the visibility, in failing to observe the ATLANTIC SUN when she was visible or should have been visible, in pursuing a changing and erratic course and in failing to give proper signal of change of course or intended change of course.

7. Those in charge of the navigation of the Esso New York were further negligent in failing to perceive the right swing of the ATLANTIC SUN and in executing a hard left rudder when prudent navigation and seamanship dictated and required that the Esso New York either hold her course or execute a right rudder.

8. The Esso New York negligently changed her course by coming hard left when the ATLANTIC SUN was on her port bow and swinging right which was or should have been evident to those navigating the Esso New York.

9. The NEW YORK's navigation prior to her hard left rudder was erratic and indecisive.

10. The ATLANTIC SUN was prudently navigated at all material times.

11. The SUN's navigation gear and machinery were in good operating condition and the vessel was seaworthy in all respects, and the lack of a course recorder did not render her otherwise and did not contribute to the accident or collision.

12. The ATLANTIC SUN's radar was at all times properly used and properly interpreted and her navigation did not contribute to the collision.

13. Lack of fog signals by either vessel (which would have been improper after visual sighting) did not contribute to the accident or collision; neither did the lack of radar plots by either vessel contribute thereto.

14. The lack of a lookout on the bow of the ATLANTIC SUN did not contribute to the accident or collision.

15. Neither vessel was being operated at an immoderate speed under the circumstances.

16. The ATLANTIC SUN is entitled to exoneration from liability and is exonerated.

17. Petitioner is entitled to recover the cost of repairs to the ATLANTIC SUN in the stipulated amount of $353,888.80.

18. It was reasonable to keep the crew aboard the ATLANTIC SUN from December 16, 1962 to December 29, 1962 for the purpose of cleaning and steaming the vessel's tanks to make her gas-free and ready for survey and repairs. Petitioner is, therefore, entitled to recover the crew's wages for this period in the stipulated amount of $16,697.72.

19. It was reasonable for petitioner to consume engine supplies during the period December 16, 1962 to December 29, 1962. Petitioner is, therefore, entitled to recover the cost of these supplies in the stipulated amount of $4,562.10.

20. It was reasonable for petitioner to consume deck supplies during the period December 16, 1962 to December 29, 1962. Petitioner is, therefore, entitled to recover the cost of these supplies in the stipulated amount of $182.40.

21. It was reasonable, in mitigation of damages, and otherwise, to divert the Sabine Sun in order to load and carry the ATLANTIC SUN's cargo. Petitioner is, therefore, entitled to recover the cost thereof in the amount of $31,772.44.

22. Charter hire allegedly lost to the ATLANTIC SUN by reason of the accident or collision does not constitute a recoverable item of damage.

23. Petitioner, Sun Oil Company, is entitled to damages in the total sum of $407,093.55, together with interest at the legal rate, to the date of judgment herein and costs reasonably incurred in this proceeding.

ORDER.

AND NOW, this 25th day of February, 1969, in accordance with the above Findings of Fact and Conclusions of

Law, It Is Ordered that judgment be entered in favor of the petitioner, Sun Oil Company, and against the claimant, Humble Oil and Refining Company, in the amount of $407,093.55, together with interest thereon at the legal rate to the date hereof, and costs reasonably incurred.

E. Mac Troutman,
J.

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 17,870

IN RE: PETITION OF SUN OIL COMPANY, as owner of Tank Ship ATLANTIC SUN, for exoneration from and limitation of liability

Humble Oil and Refining Co., Claimant, *Appellant*

Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued January 9, 1970

Before Biggs, Van Dusen and Aldisert, *Circuit Judges*

Reargued June 23, 1970

Before Hastie, *Chief Judge*, and Smith and Aldisert, *Circuit Judges*

OPINION OF THE COURT.

(Filed October 2, 1970)

Aldisert, *Circuit Judge*

Scattered on this record is the factual debris that remains when, unfortunately, two ships do not pass silently in the night. The collision on December 16, 1962, between the *SS Atlantic Sun* and the *SS Esso New York*, both loaded tankers, resulted in the filing of claims by the owners of

both vessels. Following an extended trial, the district court determined that the *Sun* "did all that could reasonably and prudently be done, under the circumstances, to avoid the collision," and granted Sun Oil Company exoneration from liability. The *Esso* was held solely responsible and Humble Oil and Refining Company was assessed damages in the amount of $407,093.55. This appeal followed.

On the morning of the collision, the *Sun* was bound for the open sea, leaving the Delaware River channel and proceeding down the Delaware Bay on a constant course of 157°. The inbound *Esso* was proceeding up the Bay at a course varying between 350° and 003°, having navigated on the west side of the river channel opening in order to take aboard a river pilot at Lewes, Delaware. At approximately 0901, when the vessels were roughly three miles apart, the *Sun* detected the *Esso* on her radar. Her master concluded that the ships would pass safely starboard-to-starboard if the *Sun* maintained the 157° bearing. There was logic to the expectation of starboard-to-starboard passing: *Sun* was on a southeastward heading; *Esso* was coming from the west shore and was proceeding northwardly, making for the channel entrance.

By 0903 the vessels had closed to approximately one mile of each other. Radar observations by the *Sun* confirmed her earlier belief in the safety of a starboard-to-starboard passing, and subsequent visual sightings allegedly substantiated this belief. At 0906.2, however, the *Esso* began moving east of 360°, a movement presumably designed to emphasize the pilot's belief that a port-to-port passing should be executed. This gradual shifting of course was observed by the *Sun*.

At 0907, the master of the *Sun*, deciding that a safe starboard-to-starboard passing was no longer possible due to the *Esso's* change of course, ordered a 10° right rudder

in order to execute a port-to-port passing. Ten seconds later a 20° right rudder was ordered. Before these course changes were seen by those on the bridge of the *Esso*, however, the *Esso*, at 0907.2 or .3, began to check its right swing and come slowly left. By 0907.5, before *Esso's* right swing was entirely checked, it had reached a bearing of 010° which was perceptible to the *Sun*. Within the next thirty seconds the *Esso's* left rudder brought her to 008.4° but this 1.6° course change was not discernible to the *Sun*.

By 0908, therefore, the inbound *Esso* with engines full ahead was swinging left at 14.2 knots. The outbound *Sun* was swinging right at 11.7 knots, having moved 14° from its 157° bearing to 171°. At this time *Sun* went hard right rudder and the *Esso* began hard left, and both vessels were *in extremis* and on a collision course. Approximately one minute later the *Sun* sounded her danger signal and ordered her engines full astern. Just prior to the collision the *Esso* also ordered her engines reversed, but even the prompt execution of the order was unavailing. At 0909.5 the vessels collided.

Sun Oil contends that prior to 0906.2 when the *Esso* commenced a 10° right swing, the *Sun's* master correctly concluded that the ships could have passed safely starboard-to-starboard; that the *Sun's* course change to the right was necessitated by the *Esso's* improper change of course from 360° to 010°; that even after *Esso's* right rudder the *Sun's* right rudder created a safe port-to-port passing situation; and that *Esso's* final hard left constituted the sole proximate cause of the collision.

Humble Oil argues that a safe starboard-to-starboard passing was never possible without earlier course changes. It insists that proper seamanship required the *Sun* to establish a port-to-port passing and to direct her course to *Esso's* stern; that the *Esso's* course change from 360° to 010° was justified as an attempt to create the correct

passing pattern; that its subsequent hard left was executed not at 0908, but at 0907.3 before any perceptible course change by the *Sun;* and that this maneuver, putting the *Esso in extremis*, rendered any subsequent evasive tactics impossible. Humble concludes, more from dedicated advocacy than persuasive logic, that the sole cause of the collision was the *Sun's* failure to stay clear as required by the Inland Rules of the Road, Art. 19, 33 U. S. C. § 204, thus creating a situation in which each vessel found it necessary simultaneously to guess at the other's intentions. Alternatively, Humble urges that, assuming its negligence, the like negligence of *Sun* in the failure to change course earlier should have precluded *Sun's* right to recover.

Filing extensive Findings of Fact, a Discussion and Conclusions of Law, the district court resolved all critical doubts in favor of the *Sun*. It found that when the *Sun* first sighted the *Esso* on her radar at 0901 her master correctly concluded that there would be a safe starboard-to-starboard passing. It also found that the *Sun's* 10° and 20° right rudders (at 0907 and 0907.17) were necessitated by the *Esso's* swing to the right which began at 0906.2, and that had these respective courses been maintained the vessels would have been cleared for a port-to-port crossing at a distance of approximately 1500 feet.

It was determined that the *Sun* was at all material times proceeding "at a prudent and moderate rate of speed," and that the *Esso's* engines were full ahead and accelerating after picking up the pilot. The district court further found that *Esso* began her hard left rudder at 0908, that by this time the *Sun* had come 14° to her right, from 157° to 171°, that this course change should have been observed by the *Esso*, and that the *Esso* should have and could have done precisely the opposite of what she did do: she should have executed a hard right rather than a hard

left. In the words of the district court, "[t]he sole substantial cause of the collision was the *Esso New York's* left rudder when the vessels were clear for a safe port-to-port passing." As noted, the *Sun* was held blameless.

We have engaged in a painstaking review of the record in this case. Had we presided at the trial of this cause it is possible that the complex factual array would have led us to a different result. But in our role as an appellate tribunal, we are unable to say that the essential findings of the district court on the negligence of the *Esso* and the exoneration of the *Sun* were "clearly erroneous." Rule 52(a), Fed. R. Civ. Pro. Although the evidence was not uncontradicted, it was sufficient to support the trial court's findings.

This court has carefully defined our role as an appellate court in reviewing factual findings of a trial court. In *Speyer v. Humble Oil and Refining Co.*, 403 F. 2d 766, 770 (3 Cir. 1968) we said:

> In reviewing the decision of the District Court, our responsibility is not to substitute findings we could have made had we been the fact-finding tribunal; our sole function is to review the record to determine whether the findings of the District Court were clearly erroneous, i.e., whether we are "left with a definite and firm conviction that a mistake has been committed."

This is consistent with the governing principles enunciated by the Supreme Court:

> While, of course, it would be our duty to correct clear error, even in the findings of fact, [plaintiff] has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial

> court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of the evidence is not "clearly erroneous."

United States v. Yellow Cab Co., 338 U. S. 338, 342 (1949). And to the same effect is Mr. Justice Douglas' statement in *United States v. National Ass'n. of Real Estate Bds.*, 339 U. S. 485, 495-96 (1950):

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. [citations omitted] We are not given those choices, because our mandate is not to set aside findings of fact "unless clearly erroneous."

Finally, we find no error in the allowance of damages for the expenses incurred in diverting another vessel to transport *Nun's* cargo to its destination, or in the award of interest—conceded by Humble to be discretionary—from the date of the collision. *See, e.g., Rugo Constr. Co. v. New England Foundation Co.*, 172 F. 2d 964, 967-68 (1 Cir., 1949); *O'Brien Bros. v. The Helen B. Morgan*, 160 F. 2d 502, 506 (2 Cir. 1947).

The judgment of the district court will be affirmed.

On this record Judge Seitz cannot accept as many of the findings and conclusions of the district court as does the majority. However, he concurs in the affirmance of the judgment below because there is a sufficient evidentiary basis for the conclusion of the district court that *Esso's* negligence was the sole proximate cause of the collision.

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 17,870.

IN RE: Petition of SUN OIL COMPANY, as Owner of Tank Ship ATLANTIC SUN, for Exoneration From and Limitation of Liability

HUMBLE OIL and REFINING CO., Claimant,

Appellant

(D.C. No. 383 of 1963 in Admiralty)

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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Present: Hastie, *Chief Judge* and Seitz and Aldisert, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued and re-argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 25, 1969, be, and the same is hereby affirmed, with cost taxed in favor of appellee.

Attest:

Thomas F. Quinn,

Clerk.

October 2, 1970

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17,870.

IN RE: PETITION OF SUN OIL COMPANY, AS OWNER OF TANK SHIP ATLANTIC SUN, FOR EXONERATION FROM AND LIMITATION OF LIABILITY

HUMBLE OIL AND REFINING CO., CLAIMANT,
Appellant.

SUR PETITION FOR REHEARING.

Present: HASTIE, *Chief Judge*, SMITH and ALDISERT, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

RUGGERO J. ALDISERT,
Judge.

Dated: October 22, 1970

Judges Freedman, Van Dusen, Adams and Gibbons disqualified themselves from consideration of this case.

TITLE 33 U. S. C. A. § 151-232 AND PILOT RULES ISSUED BY THE COAST GUARD 46 U. S. C. A. § 157, 33 C. F. R. § 80-80.36.

STEERING AND SAILING RULES

PRELIMINARY

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist. (§ 201; Pilot Rule 80.02)

ART. 18. RULE I. When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other. But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other.

The foregoing only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own, and by night to cases in which each vessel is in such a position as to see both the sidelights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course, or by night to cases

where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead (§ 203; Pilot Rule 80.4).

TWO STEAM VESSELS CROSSING

ART. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other (§ 204, Pilot Rule 80.7(a)).

PRIVILEGED VESSEL, DUTY

ART. 21. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed (§ 206, Pilot Rule 80.7(a)).

BURDENED VESSEL, DUTY

ART. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other (§ 207, Pilot Rule 80.9).

ART. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse (§ 208, Pilot Rule 80.7(a)).

RULE OF GOOD SEAMANSHIP

ART. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals or of any neglect to keep a proper lookout, or of the neglect of any

precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case (§ 221).

80.7 VESSELS APPROACHING EACH OTHER AT RIGHT ANGLES OR OBLIQUELY.

(a) When two steam vessels are approaching each other at right angles or obliquely so as to involve risk of collision, other than when one steam vessel is overtaking another, the steam vessel which has the other on her own port side shall hold her course and speed; and the steam vessel which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed or stop or reverse.

80.9 AVOIDANCE OF CROSSING AHEAD.

Every steam vessel which is directed by the rules in this part to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

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IN THE

Supreme Court of the United States

October Term, 1970.

No. 1263.

HUMBLE OIL & REFINING COMPANY,
Petitioner,

v.

SUN OIL CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION.

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The Court of Appeals for the Third Circuit first heard oral argument in this case before three judges on January 9, 1970. The Court on its own Motion ordered reargument before the Appeal was decided and reargument was held on June 23, 1970. Two of the judges on the first panel withdrew from consideration of the Appeal, and two other judges were substituted. We are advised by the Clerk of the Court that the withdrawals had nothing to do with the merits of this Appeal. The judge who wrote the Opinion had the benefit of both arguments.

QUESTIONS PRESENTED.

Neither of the two questions presented by Petitioner raise any issues worthy of review by this Court. This case has no extraordinary or unusual interpretation or application of the Rules of Navigation. The District Court correctly appraised the evidence furnished by fact and expert witnesses for both vessels, and the Court of Appeals' decision resulted after a "painstaking review of the record in this case." (Circuit Court Opinion p. A20).

The facts found by the District Court simply do not support the oft-repeated contentions of Petitioner that the vessels were in a crossing situation at the earliest time of visual sighting (i.e., when the ATLANTIC SUN first saw the ESSO NEW YORK at a distance of about 1.2 miles (0926 SUN time)) (District Court Opinion F/F Nos. 19, 21 pp. A5-A6).

The only question presented is whether *certiorari* should properly be granted for the sole purpose of reviewing the facts as found on all the evidence by the District Court and affirmed after "painstaking" review by the Circuit Court under the clearly erroneous rule.

STATEMENT

The facts found by the District Court and affirmed by the Court of Appeals for the Third Circuit were fully supported by the evidence. The Circuit Court held:

> "Although the evidence was not uncontradicted, it was sufficient to support the Trial Court's findings." (Cir. Ct. Op. p. A20)

The Atlantic Sun, an outbound tanker and the Esso New York, an inbound tanker, collided in the vicinity of the entrance to the Delaware River dredged channel which commences at buoy 7 at the downstream end of Brandywine Range in the upper reaches of Delaware Bay. (Tome, R. 14, 30, 45, 48-49, 110-111, 153, 154; Earner R. 262, P-3(A)(B), R. 14, 645; Regan P-33, Q. 45 p. 8, R. 1136; Foster R. 1079; P-27, R. 645; P-1, R. 2, 3) The Esso was obliged to proceed on the west side of the river channel exit to Lewes, Delaware to pick up her river pilot (P-27, R. 328, 645). Thereafter the Esso New York had to proceed in a northeasterly direction to enter the dredged channel at No. 7 buoy to proceed upriver. All of her navigation to No. 7 was to the west of the channel exit course line of the Atlantic Sun bound for sea (P-27, P-28, R. 328, 645).

The evidence established that the New York was aware that the Sun would not swing west upon clearing the dredged channel to disembark pilot (Foster R. 1080). The Sun's master was duly licensed for piloting the Delaware River; hence, the Sun did not have aboard a pilot to be disembarked at the pilot station. Likewise, in communicating by radio with the pilot boat the Sun knew that the New York was approaching the dredged channel entrance after picking up her pilot at the pilot station at Lewes on the west side of the channel exit (Tome R. 34, 35).

Had the Esso New York headed straight for the entrance to the dredged channel at buoy No. 7, and had the Sun continued on to sea on the Brandywine Range Court (157° True) to sea, no collision would have occurred (P-27, P-28, R. 328, 685).

The District Court found on a preponderance of all the credible evidence that the erratic, inattentive and negligent navigation of the Esso New York, culminating in an unjustified hard left rudder when the vessels were sheered up for a safe port to port passing, was the sole substantial cause of the collision (F/F 29-31, C/L 3-5) (District Ct. Op. pp. A8-A9, A12-A13).

The Esso New York's Statement of Facts on pages 3-6 of Petitioner's Brief is literally correct only in certain respects. The selectivity of Petitioner in mixing some unsupported contentions together with certain contested facts of the Sun's navigation raises many unproved inferences which were rejected by both Courts below. Such a selective statement of the facts cannot furnish a proper basis for analysis of the factual background upon which the trial judge decided the case.

Exhibit P-27 (R. 685), prepared by the Sun's expert Suarez was unchallenged and demonstrated unequivocally the approach of each vessel to the point of collision (0329.5 Sun time). A large scale drawing of the approach of the respective vessels from 0302 (Sun time) was likewise unchallenged and accepted by both Courts (P-28).

Petitioner's reproduction of P-28 is illegible and inadequate to interpret accurately the factors of course, speed, time and bearings of each vessel (P-28 is reproduced full size at p. A27 of the Appendix to this Brief).

The Trial Court found on uncontested evidence that on first visual sighting the vessels "were so far to the starboard of each other, that a starboard to starboard

passing was safe and practicable." (F/F No. 21) (Tome R. 36-37; Harner R. 385; Suarez 372-373; Quintgaard R. 1169). The Court further held:

> "Assuming no change, those on the SUN correctly estimated that the vessels would pass starboard to starboard at a distance between ¼ and ½ of a mile, a safe passing in the restricted waters of the Delaware Bay." (F/F No. 21, D. Ct. Op. p. A6)

Tome R. 162; Foster R. 1125; Stark R. 1025-1027, 1070, 1072.

The Court was undoubtedly impressed by the fact that the ATLANTIC SUN saw the RINO NEW YORK at 1.2 miles distant (Tome R. 36; Suarez R. 372-373; Harner R. 381) (0606 SUN time) (See Point "C" in original Exhibits P-27 and P-28) when each vessel should have been visible to the other, although the RINO admitted not seeing the SUN until the vessels were .6 of a mile apart (F/F No. 26) (Foster R. 1102-1103; Ehman P-36, Q. 46, p. 39, R. 1168, 1164; Regan P-35, Q. 18, p. 3, Q. 46, p. 8, R. 1136).

Two witnesses for the RINO NEW YORK supported the SUN's estimate of visibility (Bankers P-37, Q. 27-28, 37, pp. 34, 35, R. 1169, 1164; DaSilva P-38, Q. 30, p. 38, R. 1169, 1164). Captain Foster, RINO's pilot, twice admitted he misjudged his visibility (Foster R. 1100, 1122).

The District Court concluded such mis-judgment could only result from inattentive, careless and negligent navigation (F/F No. 26; C/L No. 6, D. Ct. Op. pp. A7, A13).

Captain Foster admitted, four times during his testimony that when he first saw the ATLANTIC SUN he was "scared to death" (Foster R. 1092, 1092, 1111, 1113).

The District Court correctly found:

> "Immediately after the first visual sighting of the NEW YORK, those on the bridge of the SUN observed

the NEW YORK coming to her right to a heading which would take her across the track of the ATLANTIC SUN. (Tome R. 39; Earner, R. 202). The NEW YORK's course recorder tracing confirms her right swing and this was observed by those on the ATLANTIC SUN. (P-4, R. 9; Tome R. 39; Earner R. 202; P-25, R. 510, 645; P-26, R. 513, 645). Upon observing the NEW YORK's change of heading to her right, the SUN sounded a short blast (one second's duration) on her whistle to indicate that she was coming to the right and a 10° right rudder was ordered and executed. (Tome R. 39-40, 86, 143; Earner R. 202). The vessels, at this time, were a little over ¾ of a mile apart. About ten seconds later, the ATLANTIC SUN sounded another one second blast on her whistle and ordered a 20° right rudder in order to bring her heading more quickly to the right." (Tome R. 40-42, 87-88; Earner R. 203), (F/F No. 22) (D. Ct. Op. p. A6, Citations added).

At this point, the vessels were clear for a port to port passing, which would have been at a distance between them of 2 to 3 ship lengths, or about 1500 feet (Tome R. 41, 88; Earner R. 205; Foster R. 1125; Suarez R. 600, P-28, R. 528, 645). This would have been a safe passing in the restricted waters of the Delaware Bay (Tome R. 162; Foster R. 1125; Slack R. 1025, 1070). At 0908 (SUN time) the SUN went hard right rudder in order to gain maximum clearance between the ships (Tome R. 41-43, 88; Earner R. 205).

Thereafter, the NEW YORK went hard left notwithstanding those on the NEW YORK observed the SUN on their port bow (Foster R. 1112, 1116-1117; Regan P-55, Q. 31, p. 6, R. 1138; Ekman P-56, Q. 47-49, p. 39, Q. 106-107, p. 44, Q. 111-113, p. 45, Q. 152, p. 49, R. 1168, 1144; DaSilva P-58, Q. 23-24, p. 58, R. 1169, 1144).

Experts for both sides agreed that this hard left was imprudent (Quistgnard R. 1198, 1201, 1221; Juston R. 1240-1241).

Once the Court found that the vessels were clear for a safe port to port passing (F/F No. 23) it was inescapable that the hard left of the New York was the *sole* cause of the collision (F/F No. 29-30, Conc/Law No. 5, 6, D. Ct. Op. pp. A8-A9, A12-A13).

Petitioner argues for *certiorari* on the unsound basis that the Courts below incorrectly interpreted the fact situation of the relative positions of the vessels at the time of first sighting (0906 Sun time). This is a simple attempt to obtain a reversal by yet another review of the evidence. In these circumstances, the Petition should be denied.

REASONS FOR DENYING THE WRIT.

1. There Is No Conflict Between the Decision Below and Decisions in Other Circuits.

The facts as found by the District Court and approved by the Circuit Court fully dispose of the questions whether the approach of the Sux and the New York should be deemed a meeting or a crossing.

Petitioner made this argument at the trial and again on appeal. The Circuit Court properly rejected it as nothing more than a disagreement with District Court's analysis of the evidence. The Court held:

> "We have engaged in a painstaking review of the record in this case. Had we presided at the trial of this cause it is possible that the complex factual array would have led us to a different result. But in our role as an appellate tribunal, we are unable to say that the essential findings of the District Court on the negligence of the Esso, and the exoneration of the Sux were "clearly erroneous". Rule 52(a) Fed. R. Civ. Pro. Although the evidence was not uncontradicted, it was sufficient to support the trial court's findings." (Cir. Ct. Op., p. A20)

The District Court determined that at about 0906, when the Sux first saw the New York visually, the vessels were in position to pass starboard to starboard and therefore were on meeting courses within the meaning of Inland Rules of the Road (33 U. S. C. § 203, pp. A25-A26). The Court found as a fact:

> "When the Esso New York was first visually observed by the Sux, she appeared to be on a course about parallel (though not precisely reciprocal) to that of the Sux and heading for Number 7 buoy at the en-

trance to Brandywine Range. *The vessels were so far to the starboard of each other that a starboard passing was safe and practicable* [Emphasis added]. Assuming no change, those on the SUN correctly estimated that the vessels would pass starboard to starboard at a distance between ¼ and ½ of a mile, a safe passing in the restricted waters of the Delaware Bay (Tome R. 36-37, 88-89, 162; Earner R. 205; Quistgnard R. 1189, 1212-1231; Foster R. 1125). In Brandywine Range, a thousand foot wide channel, vessels meet and pass full speed with no more than 200-500 feet between them." (D. Ct. Op. p. A6; F/F No. 21) (Citations added).

The Court then correctly concluded as a matter of law that:

"Thereafter the ESSO NEW YORK negligently failed to continue a starboard passing, but instead, without signal, negligently converted the approach to a port to port passing by changing course to the right." (D. Ct. Op p. A12; C/L No. 4).

To conclude as does Petitioner that the facts of the approach of each vessel to the other amounted to a crossing situation under the Inland Rules of Navigation requires the Court to upset the facts found by the District Court and affirmed by the Court of Appeals.

The argument that mere intersecting course lines make a crossing case was properly rejected by the Trial Court (F/F No. 21, C/L No. 4, D. Ct. Op. pp. A6, A12).

Both the master and watch officer of the SUN testified that when they first sighted the NEW YORK visually she appeared to be on a parallel although not a precisely reciprocal course to the SUN (Tome R. 36-37; Earner R. 201-292).

This observation was supported by New York's mate on watch and her lookout (Ehman P. 56, Q. 26-28, p. 38, Q. 47, p. 39, R. 1138, 1144; DaSilva P-58, Q. 15-25, pp. 57-58, R. 1139, 1144).

The Inland Crossing Rule (33 U. S. C. §§ 204, 206-208, pp. A25-A26) does not define a "crossing." However, case authority establishes that when vessels are on substantially reciprocal courses their approach is within the meaning of the meeting rule (33 U. S. C. § 203, pp. A25-A26) even if their courses may vary from the reciprocal as much as 1½ to 2 points, or as much as 23°. This bearing was the approximate difference between the courses of the Sun and the New York. (See P-27 at 0906 Sun time.) *The Victory and the Plymothian*, 168 U. S. 410 (1897), *The Sabine Sun*, 21 F. 2d 121, 123 (E. D. Pa.) 1927 AMC 1871 (unofficially reported); *The Amolco*, 283 F. 890 (1 Cir. 1922).

It is well established that when two vessels are clear to pass starboard to starboard they *must* do so and it is a fault to attempt to alter the situation. *Smoot Sand and Gravel Corp. v. Baltimore Steam Packet Company*, 250 F. 2d 422, 424 (D. C. Cir. 1957), 1958 AMC 44 (unofficially reported); *The Bellhaven*, 72 F. 2d 206, 207 (2 Cir. 1934), 1934 AMC 1100 (unofficially reported); *The Deutschland*, 14 F. Supp. 282, 287 (S. D. N. Y. 1936), 1936 AMC 459 (unofficially reported), aff'd 90 F. 2d 454 (2 Cir. 1939), 1937 AMC 859 (unofficially reported).

In the *Baltimore Steam Packet* case, *supra*, the Court held:

> "According to the record these two vessels were in a position to pass starboard to starboard and could safely have done so provided each kept its course. This being so, each was *bound* to hold its course . . . . In the face of this situation the steamer was clearly

negligent for turning to her right and attempting to make a port to port passing. (p. 424)"

In *The Deutschland*, the Court held:

"The vessels being on courses to pass starboard to starboard should have passed that way; no assent to such a passing was required under the present rules." (p. 287)

The finding that at first visual sighting a starboard to starboard passing was safe and practicable necessarily demonstrates, (a) that the approach of these vessels was a meeting not a crossing, and, (b) that risk of collision did not exist at this time, contrary to Petitioner's arguments.

Petitioner's demonstration on page 10 of its brief confirms the SUN situation as a meeting with a course difference of 23°. (Subtract 157° from 180°, the reciprocal of the Esso course of true North 000° to obtain the bearing difference.)

The diagram of the course lines to the right on page 10 shows 27° as the course difference in *The Gypsum Packet*, 153 F. 2d 773 (2 Cir. 1946) case. This is clearly excessive under case law for a meeting course; it was an obvious crossing and the Trial Court found that the burdened vessel was attempting to cross the course of the other vessel.

The *Gypsum Packet* case may also be distinguished on the basis that there the privileged vessel was exonerated; the Court found that in any event the burdened vessel's actions would lead to collision (p. 777). On the contrary, if the SUN were burdened, the Court found that she did all she could to avoid collision (D. Ct. Op., p. A12).

Even if this case is regarded as a crossing, the privileged vessel's (Esso) navigation was deemed variable and erratic and her course changes were made without particular refer-

ence to the SUN (D. Ct. Op. pp. A11, A13). In *Gypsum Packet*, the Court ruled that the "privileged vessel shall do nothing to change her successive positions as the burdened vessel could forecast them when the burdened vessel began to be under a duty to keep out of the way." (p. 776).

The case at bar does not produce a conflict in the law between the Circuits; it is no more than a *different set of facts* from which different conclusions of law logically follow.

Even if the SUN were the burdened vessel in a crossing situation after first visual sighting (0906 SUN time) and when shaped up for a safe starboard to starboard passing without further course changes, the evidence established that the SUN actually fully complied with the crossing rule by coming right; the facts would have justified no earlier right turn than the SUN actually executed (D. Ct. Op. pp. A6-A7, F/F Nos. 22-23).

The Trial Court considered and properly rejected the argument that the ATLANTIC SUN was at fault for allegedly not complying with the crossing rule (33 U. S. C. §§ 204, 206-208):

> "Claimant vigorously contends that the ATLANTIC SUN was also at fault suggesting that, as the burdened vessel, . . . she was otherwise at fault in doing too little, too late . . . The overwhelming weight of the evidence seems to conclusively establish that the ATLANTIC SUN, as the *burdened vessel* (Emphasis added) did all that could reasonably and prudently be done under the circumstances, to avoid the collision and that she was not at fault." (D. Ct. Opinion pp. A11-A12)

See also, F/F Nos. 22-23 (pp. A6-A7).

The propriety and prudence of the SUN's rudder action at all times was correctly analyzed by the District Court and

its findings were supported by the overwhelming weight of the credible evidence, as summarized:

> (a) At first visual sighting no rudder action was required; a safe starboard to starboard passing of ⅛th of a mile was apparent, without any further change of course. (Tome R. 36-37; Earner R. 205; Suarez R. 575; Quistgaard R. 1189.)
>
> (b) The Sux's right rudder (10°, 20° and then hard right—0907, 0907:17, and 0908 respectively) was promptly and properly made when the vessels were ¾ of a mile distant after Esso's right turn at 0906.5 (Sux time). (Tome R. 38-42; Earner R. 202-204; Suarez R. 542-543; Quistgaard R. 1193-1195.)
>
> (c) After the Sux's right rudder, the vessels without further change could pass safely port to port with no risk of collision. (Tome R. 41-42; Earner R. 202-204; Suarez R. 600; Quistgaard R. 1196-1197.)
>
> (d) Sux was *in extremis* after 0908 by reason of her substantial right turn. (Suarez R. 582, 596; Quistgaard R. 1205-1206.) Experts for both the Sux and Esso agreed that the Esso never should have come left at this time, but should have continued to the right after 0906.5. (Quistgaard R. 1200-1202, 1222-1223; Juston R. 1244.)
>
> (e) The Esso could have come right by 0908 (Sux time) and avoided collision, even though already turning on a left rudder which commenced at 0907.3 (Sux time). (Quistgaard R. 1202, 1222-1223.)

If the Sux were in a crossing situation after 0906 (Sux time) when the vessels were visible and the Sux

because the allegedly burdened vessel, the Court found as a fact that the SUN complied as a burdened vessel, by coming right to pass under the stern of the NEW YORK. The right turn made at 0907 could not have been executed prior to about 0906 (when the NEW YORK first became visible) because the NEW YORK on first becoming visible was still (without further course change) in position for a safe starboard to starboard passing (F/F Nos. 22-23, pp. A6-A7).

Petitioner seeks nothing more than a third appraisal of the evidence. The Supreme Court has repeatedly stated that when both Courts below have revi/ewed the facts and agree on the findings, it will not agair undertake a review of the facts. *Berenyi v. Dist. Director, Immigration and Naturalization Service*, 385 U. S. 630 (1966); *Graver Tank & Mfg. Co. v. Linde Air Products*, 336 U. S. 271, 274-275 (1949); *Magnum Co. v. Coty*, 262 U. S. 159, 163 (1923); *Stuart v. Hayden*, 169 U. S. 1 (1897).

In *Berenyi*, the Court held:

> "The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower Courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the Trial Court, the rule has particular force." (p. 636)

There is no mistake in the findings and conclusions of the District Court. The District Court's findings followed its resolution of questions of credibility and the conclusions of law followed the facts found.

The refusal of the Trial Court to accept some findings and its adoption of others, based on an appraisal of the

witnesses and all the credible evidence is not a proper basis for granting a Petition for Certiorari.

In these circumstances, there is no conflict among the Circuits.

2. The Decision Below Is Not Contrary to the Decision of This Court in THE PENNSYLVANIA, 19 Wall. (86 U. S. 125).

Petitioner's argument that the Courts below in this case completely ignored the Pennsylvania rule is devoid of merit.

The application of the Pennsylvania Rule was fully briefed by both parties in the District and Circuit Courts. This respondent urged the application of the Pennsylvania rule to the faults of the Esso New York and the rule was correctly applied.

It is clear from the decision of the Trial Court that none of the alleged faults of the Sun could have caused the collision; the District Court found that the *sole* (italics added) cause of the collision was Esso's hard left rudder (F/F No. 28, D. Ct. Op. p. A10). The Circuit Court affirmed that the sole substantial cause of the collision was the Esso's negligence (Cir. Ct. Op. p. A20). Even Judge Seitz, who was unable to "accept as many of the findings and conclusions of the District Court as does the majority", concurred "in the affirmance * * * because there is a sufficient evidentiary basis for the conclusion of the District Court that Esso's negligence was the sole, proximate cause of the collision." (Cir. Ct. Op. p. A21).

The alleged failure to blow fog signals and the failure to place a lookout on the bow clearly could not have been contributing causes since neither Court below could have reached the foregoing conclusions as to *sole* (italics added) causation. In any event, the Trial Court after "filing extensive Findings of Fact and Discussion and Conclusions

of Law * * * resolved all critical doubts in favor of the Scn." (Cir. Ct. Op. p. A19).

The decision of the Court below does not conflict with any prior decisions of this Court as to the Pennsylvania rule.

3. There Are No Questions Presented to This Court Which are of National or International Importance.

There has never been any argument in this case as to how the crossing rule should be construed. The issue below has always been simply whether the facts were such that the crossing rule should apply. These issues of fact have been correctly resolved against petitioner by both the District Court and The Circuit Court.

No change in statutory construction is involved in this case.

The construction of the rules of the road relevant to this situation is well settled. The application of the steering and sailing rules is determined by the relative positions of the vessels when they began to navigate in sight of one another. *Albert Du Mois*, 177 U. S. 240, 254 (1899). *The Bilbster*, 6 F. 2d 954, 956 (2 Cir. 1925), 1925 AMC 795 (unofficially reported); *The Arfeld*, 42 F. 2d 745, 746 (E. D. La. 1930), 1930 AMC 1703 (unofficially reported); *United States v. SS Soya Atlantic*, 213 F. Supp. 7, 20 (D. Ct. Md. 1963), aff'd 330 F. 2d 732 (4 Cir. 1964). This determination depends solely on the Court's resolution of the evidence in each individual case.

Where a Petitioner asks for nothing more than a third review of the facts, this Court has held as a matter of law that the case is of importance only to the parties and accordingly, the Petition will not be granted. *Rudolph v. United States*, 370 U. S. 269, 270 (1961).

There is no issue of national or international importance to be resolved in the case at bar.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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RAWLE & HENDERSON,
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ALFRED J. KUFFLER,
Of Counsel.

Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

No. 383 OF 1963, IN ADMIRALTY.

PETITION OF SUN OIL COMPANY, AS OWNER OF TANK SHIP ATLANTIC SUN, FOR EXONERATION FROM AND LIMITATION OF LIABILITY.

FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW AND ORDER.

TROUTMAN, *J.* February 25, 1969.

On December 16, 1962, the ATLANTIC SUN, owned by the Sun Oil Company, and the ESSO NEW YORK, owned by the Humble Oil and Refining Company, collided in the Delaware Bay. Substantial damage resulted to both vessels.

Sun Oil Company filed a petition seeking exoneration from and limitation of liability. Humble Oil and Refining Company thereafter filed its answer and claim of damages. Thus, the owner of each vessel seeks recovery from the other for losses and damage sustained as a result of the collision.

Prior to the collision the ATLANTIC SUN was proceeding outbound from Marcus Hook and the ESSO NEW YORK

was proceeding inbound after taking a pilot on board at Lewes, Delaware.

The case was ably tried by experienced counsel who have submitted complete briefs and memoranda together with requests for findings of fact and conclusions of law. Extended testimony was taken and other evidence submitted, all of which has been carefully reviewed. Accordingly, the Court makes the following:

FINDINGS OF FACT.

As to the Accident.

1. Petitioner, Sun Oil Company, was at all pertinent times a New Jersey Corporation and the owner and operator of the tank ship ATLANTIC SUN.

2. Humble Oil and Refining Company, claimant, in these proceedings, was at all pertinent times a Delaware Corporation and owner and operator of the tank ship ESSO NEW YORK.

3. The ATLANTIC SUN was a diesel-powered tanker built in 1943 by the Sun Shipbuilding and Dry Dock Company, Chester, Pennsylvania. She was 547' long, 70'2" in beam.

4. The ESSO NEW YORK was a steam turbine reduction gear tank ship built in 1950. She was 602'2" in length, 827"' in beam.

5. (a) The ATLANTIC SUN departed from Marcus Hook at 0348, December 16, 1962. Prior to departure, all navigation gear was tested and found to be in good working order, including a Raytheon radar machine and gyrocompass. It lacked a course recorder which is not necessary to navigation in the Delaware River and Bay. Lack of such a recorder did not contribute to the accident.

(b) The ATLANTIC SUN had a full complement of officers and men and all officers were duly licensed. Her master's license contained a radar endorsement indicating that he had successfully completed both basic and advanced courses in the use and interpretation of radar.

6. At departure, the master was at the conn in the wheelhouse assisted by the second officer, the watch-officer, and the third officer and helmsman. The master was acting as his own pilot and was piloting the vessel from departure until collision under his First Class Pilot's license issued by the United States Coast Guard, under statutes and regulations of the United States, allowing him to pilot vessels of any gross tonnage in the Delaware Bay and River. The duties of master and pilot do not and did not interfere with each other.

7. The master, the mate and the helmsman were in the wheelhouse during the events leading up to the collision. The Third Engineer was in charge of the engine room assisted by an oiler.

8. On departure from Marcus Hook visibility was estimated to be between 8 and 10 miles. By the time the ATLANTIC SUN reached Miah Maull Lighthouse in Miah Maull range at 0748, visibility had closed slightly to about 8 miles.

9. Those in charge of the navigation on the ATLANTIC SUN had determined that the gyro had a 1° easterly error, which is not unusual for large ocean-going vessels and for which correction was duly made.

10. The ATLANTIC SUN proceeded down river without incident, passing Brown Shoal buoy #7 at 0859 which buoy marks the seaward entrance to the dredged channel. When abeam of #7, the ATLANTIC SUN's engines were turning 73

rpms and the vessel was making 10.7 knots over the ground, the current was flooding at about 1 knot, the wind was from the northwest, Force 2 (about 3-5 miles per hour), and the visibility had reduced to about 3 miles.

11. Meanwhile, on December 16, 1962, the Esso New York was proceeding inbound, having picked up a pilot at the pilot station at or about 0846, at which time she was dead in the water.

12. At all material times, the pilot of the Esso New York was being assisted on the bridge by the captain and third mate, a quartermaster was at the helm, and a lookout was posted on the bow.

13. At all material times, the vessel's engines were on full ahead and her speed was increasing as she accelerated after picking up the pilot so that at or about the time of collision she was making a speed of approximately 14 knots.

14. The Esso New York remained on a course of 350° True until 0851.6 when she came right and steadied up on a course of 003° True. She remained on this course until 0859 when she came left to 350°. At 0901.1, the New York came right to a course of 360° True and remained on this course until 0905.7. At this point, she came right, swinging to a heading of 010° True, but never steadied up on this course. Instead, about 0906.7, she had begun to check her swing to the right and came slowly left; by 0908.5 her rudder was placed hard left and she continued swinging to the left until collision at 0909, New York time. The heading of the Esso New York at collision was 282.5° True. There was a half minute time differential between the Sun and the New York, thus 0909 New York time was 0909.5 on the Sun.

15. The pilot of the New York had forgotten or otherwise failed to have with him his portable radio-telephone

which is frequently used by Delaware River pilots for instant communication with the pilots of other vessels. The pilot's portable radio-telephone is an aid to navigation used to assist the pilots in determining the intentions of other ships being navigated in their vicinity.

16. The SUN, on the contrary, was equipped with ship to ship radio-telephone, which was in good operating condition, and was used by the master to communicate with the pilot boat which advised him the Esso NEW YORK was inbound with a pilot.

17. As the ATLANTIC SUN passed abeam of buoy #7 at 0859, visibility was about three miles. The radar was operating and set on the 8 miles range. She was steering 156° to make good 157° True. She remained on a course of 157° True until 0907 SUN time, or about 2½ minutes prior to the collision.

18. At about 0901, SUN time, the master of the SUN sighted the NEW YORK on his radar three (3) miles distant bearing about 10° on the starboard bow. Subsequent radar observations indicated that the bearing of the Esso NEW YORK was opening to the right. Therefore, the SUN's master properly concluded that the vessels would safely pass starboard to starboard. Plottings were not made and none were necessary. ATLANTIC SUN's master did not misinterpret his radar.

19. At about 0906, SUN time, radar observations by the SUN's master of the NEW YORK when Esso was about one (1) mile distant, confirmed a safe starboard to starboard passing. Subsequent visual sighting of the Esso NEW YORK confirmed such radar observations.

20. Before a lookout was posted on the bow and fog signals sounded, the Esso NEW YORK was visually sighted

from the bridge of the ATLANTIC SUN. The absence of a lookout and the absence of fog signals prior to visual contact did not contribute to the accident.

21. When the Esso NEW YORK was first visually observed by the SUN, she appeared to be on a course about parallel (though not precisely reciprocal) to that of the SUN and heading for #7 buoy at the entrance to Brandywine Range. The vessels were so far to the starboard of each other, that a starboard to starboard passing was safe and practicable. Assuming no change those on the SUN correctly estimated that the vessels would pass starboard to starboard at a distance between ¼ and ½ of a mile, a safe passing in the restricted waters of the Delaware Bay. In Brandywine Range, a 1000' wide channel, vessels meet and pass at full speed with no more than 200 to 500 feet between them.

22. Immediately after the first visual sighting of the NEW YORK, those on the bridge of the SUN observed the NEW YORK coming to her right to a heading which would take her across the track of the ATLANTIC SUN. The NEW YORK's course recorder tracing confirms her right swing and this was observed by those on the ATLANTIC SUN. Upon observing the NEW YORK's change of heading to her right, the SUN sounded a short blast (one second's duration) on her whistle to indicate that she was coming to the right and a 10° right rudder was ordered and executed. The vessels, at this time, were a little over ¾ of a mile apart. About ten seconds later, the ATLANTIC SUN sounded another one second blast on her whistle and ordered a 20° right rudder in order to bring her heading more quickly to the right.

23. At this point, the vessels were clear for a port to port passing, which would have been at a distance of 2 to 3 ship lengths, or about 1500 feet, a safe passing in the restricted waters of the Delaware Bay. At 0900 (SUN time)

the SUN went hard right rudder in order to gain maximum clearance between the ships.

24. After executing the hard right rudder, those on the bridge of the SUN observed the NEW YORK swinging rapidly towards them as if on a hard left rudder. The vessels at this time were a little less than .5 miles apart. At or about 0909, SUN time, the SUN sounded her danger signal consisting of several short blasts on her whistle and ordered her engines to full astern with an emergency jingle on the engine telegraph. The general alarm was also rung to alert all hands.

25. The starboard bow of the ESSO NEW YORK struck the port bow of the ATLANTIC SUN at 0909½, SUN time. The impact destroyed the bow of the ATLANTIC SUN back to the windlass. The starboard anchor let go and ran out to the end, but the vessel quickly fetched up on the anchor which held the vessel in position. The angle of collision was estimated to be between 40 and 45°. Immediately after impact, the ESSO NEW YORK continued on her port swing and the starboard quarter of the NEW YORK struck the SUN again on the SUN's port quarter. Shortly after the initial impact, the master of the ESSO NEW YORK ordered full ahead and hard right rudder and moments later the ships cleared each other.

26. As the ATLANTIC SUN was proceeding outbound at 11.7 knots (see 10th finding of fact, supra) the ESSO NEW YORK was proceeding inbound at 14.2 knots. ESSO NEW YORK's pilot first observed the SUN on radar at three or four miles and visually observed the SUN for the first time at .6 of a mile distant (The helmsman and lookout on the ESSO NEW YORK made such observation at about 1 mile distant). Signals given by said lookout were not reported to the pilot.

27. At 0905.7 (NEW YORK time) the NEW YORK began coming to her right from her prior course of 360° to a heading of 010° at 0907 (NEW YORK time). This 10° swing to the right was promptly observed by the SUN. Meanwhile at 0906.8 (NEW YORK time) the Esso NEW YORK had begun to check her swing to the right, but this left rudder was not perceptible and was not observed by the SUN. By 0907.5 (NEW YORK time) the Esso NEW YORK was on a heading of 008.4° and slowly swinging to her left. This change of heading to the left of 1.6° between 0907 and 0907.5 (NEW YORK time) (0907.5 and 0908 SUN time) was likewise not perceptible and was not observed by the ATLANTIC SUN. Between 0907.5 and 0908 (SUN time) the vessels were end-on or nearly so.

28. At about 0907.5 (NEW YORK time) the NEW YORK commenced swinging hard left and continued on to hard left until collision at 0909 (NEW YORK time). The SUN perceived this hard left swing within a few seconds, but before 0908 (NEW YORK time). Just prior to collision, the Esso NEW YORK's engines were ordered full astern. Although this order was promptly acknowledged and executed in her engine room, it could not and did not avoid the collision.

29. At about 0907.5 (NEW YORK time) the SUN had already swung 14° to her right. Had those on the bridge of the Esso NEW YORK been attentive to their duties and closely watching the SUN, which was on the NEW YORK's port bow, they could and would have observed the SUN's swing to the right. Although the Esso NEW YORK heading at this moment was 008.4° and swinging slowly to her left, the NEW YORK could and should then have come hard right on her rudder instead of hard left, and the vessels would have passed safely port to port.

30. At 0907.5 (NEW YORK time) the SUN was committed to her right swing, having already turned right 14°. This

maneuver could and should have been observed by the NEW YORK navigators. By 0907.5 (NEW YORK time) the SUN was *in extremis* and could have done no more.

31. The hard left rudder of the Esso NEW YORK put her *in extremis*.

32. After the collision, the Esso NEW YORK stood by to render assistance until released. She then proceeded to Paulsboro, New Jersey, her intended destination to discharge cargo.

33. After the collision, the ATLANTIC SUN remained at anchor until the evening of December 16, 1962. The ATLANTIC SUN returned to Marcus Hook, arriving December 17, 1962.

34. Prior to the collision and at all times pertinent thereto the ATLANTIC SUN was proceeding at a prudent and moderate rate of speed and able to stop within one-half (½) the distance of her visibility (This finding is made independently of a "Stop Test" made on a sister ship, the Sabine Sun, on December 15, 1966, but is confirmed by the results of such test although we find it unnecessary to make specific findings with respect to said "Stop Test".)

35. For some time prior to the collision, the navigators of the Esso NEW YORK were less than completely attentive to the approach of the ATLANTIC SUN as disclosed by radar.

36. Shortly prior to the collision, the navigators of the Esso NEW YORK were less than completely attentive in failing to more quickly visually observe the SUN.

37. Immediately prior to the collision, the navigators of the Esso NEW YORK were imprudent in ordering a hard left rudder.

38. The sole substantial cause of the collision was the Esso New York's left rudder when the vessels were clear for a safe port to port passing.

39. The Atlantic Sun was seaworthy when leaving Marcus Hook and immediately prior to the collision with the Esso New York.

40. The Atlantic Sun is entitled to exoneration from liability and is exonerated.

41. The Esso New York is solely responsible for the collision.

As to Damages.

42. Upon completion of the damage survey of the Atlantic Sun, the vessel was a constructive total loss. The parties have stipulated the Atlantic Sun's recoverable cost of repairs in the amount of $353,888.89.

43. The cost of retaining the vessel's crew from December 16, 1962 to December 29, 1962, in the amount of $16,687.72 was reasonably incurred as it was necessary to discharge the cargo and make the vessel ready for survey.

44. The cost of engine supplies in the stipulated amount of $4,562.10 consumed between December 16 and December 29, 1962, was likewise reasonably incurred in preparing the vessel for survey and possible repairs.

45. The cost of deck supplies consumed between December 16 and December 29, 1962, was stipulated at trial as reasonably incurred in the amount of $182.40.

46. To complete the damage survey of the Atlantic Sun the removal of her cargo and the disposition of same was required. To thus dispose of cargo and in mitigation of possible damages and by reason of this collision, the Sabine Sun was diverted for 7.42 days in order to load and

carry the ATLANTIC SUN's cargo from Marcus Hook to Florida. Based on the *December 1963* operating cost of the Sabine Sun, Sun Oil Company incurred an additional out-of-pocket expense in the amount of $31,772.44 by reason of diverting the Sabine Sun. The expense of diverting the Sabine Sun was a cost actually and reasonably incurred by Sun Oil Company as a result of this collision and is allowed in the amount of $31,772.44.

47. Charter hire allegedly lost to the ATLANTIC SUN by reason of the collision does not, under the circumstances here involved, constitute a recoverable item of damage.

48. The total provable damages of petitioner, Sun Oil Company, which should be paid by claimant, Humble Oil and Refining Company, are $407,093.55, together with interest and costs as hereinafter provided.

DISCUSSION.

From the foregoing findings of fact it is evident that the navigator of the ATLANTIC SUN was at all times attentive to the position and location of the ESSO NEW YORK, changing course to meet changing conditions as they occurred and reacting to a somewhat variable and erratic course followed by the ESSO NEW YORK. The courses of the latter and the changes therein (see 14th finding of fact) seem to have been made without particular reference or regard to the approaching ATLANTIC SUN except, of course, the hard left shortly prior to collision which was made in an attempt to avoid collision, but was ordered in panic and bad judgment. Thus, the fault of the ESSO NEW YORK is self-evident.

Claimant vigorously contends that the ATLANTIC SUN was also at fault suggesting that, as the burdened vessel, she proceeded at something more than a moderate speed,

that she failed to sound fog signals, that she failed to post a lookout, that she failed to properly use her radar and that she was otherwise at fault in doing too little too late. We have carefully considered claimant's contentions, have carefully reviewed the evidence and cannot, in good conscience, reach the conclusion urged by the claimant. The overwhelming weight of the evidence seems to conclusively establish that the ATLANTIC SUN, as the burdened vessel, did all that could reasonably and prudently be done, under the circumstances, to avoid the collision and that she was not at fault.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction over the parties and the subject-matter.

2. The navigation of ATLANTIC SUN and the ESSO NEW YORK is governed by the United States Inland Rules of Navigation.

3. The ESSO NEW YORK was guilty of negligent interpretation of radar, by failure to originally conclude that, without further course changes, the vessels would pass safely to starboard at a reasonable distance.

4. Thereafter, the ESSO NEW YORK negligently failed to continue a starboard passing, but, instead, without signal, negligently converted the approach to a port to port passing by changing course to the right.

5. When the ESSO NEW YORK had crossed the ATLANTIC SUN's bow, was clear for a port to port meeting and passing, (the ATLANTIC SUN having, in the meantime, prudently altered her course to the right) the ESSO NEW YORK again negligently altered course, this time to her left, toward the ATLANTIC SUN, notwithstanding the NEW YORK had observed the SUN on her port bow.

6. Those in charge of the navigation of the Esso New York were inattentive, careless and negligent, in incorrectly interpreting the radar when the vessels were some distance apart, in failing to correctly appraise the visibility, in failing to observe the Atlantic Sun when she was visible or should have been visible, in pursuing a changing and erratic course and in failing to give proper signal of change of course or intended change of course.

7. Those in charge of the navigation of the Esso New York were further negligent in failing to perceive the right swing of the Atlantic Sun and in executing a hard left rudder when prudent navigation and seamanship dictated and required that the Esso New York either hold her course or execute a right rudder.

8. The Esso New York negligently changed her course by coming hard left when the Atlantic Sun was on her port bow and swinging right which was or should have been evident to those navigating the Esso New York.

9. The New York's navigation prior to her hard left rudder was erratic and indecisive.

10. The Atlantic Sun was prudently navigated at all material times.

11. The Sun's navigation gear and machinery were in good operating condition and the vessel was seaworthy in all respects, and the lack of a course recorder did not render her otherwise and did not contribute to the accident or collision.

12. The Atlantic Sun's radar was at all times properly used and properly interpreted and her navigation did not contribute to the collision.

13. Lack of fog signals by either vessel (which would have been improper after visual sighting) did not contribute

to the accident or collision; neither did the lack of radar plots by either vessel contribute thereto.

14. The lack of a lookout on the bow of the ATLANTIC SUN did not contribute to the accident or collision.

15. Neither vessel was being operated at an immoderate speed under the circumstances.

16. The ATLANTIC SUN is entitled to exoneration from liability and is exonerated.

17. Petitioner is entitled to recover the cost of repairs to the ATLANTIC SUN in the stipulated amount of $353,888.89.

18. It was reasonable to keep the crew aboard the ATLANTIC SUN from December 16, 1962 to December 29, 1962 for the purpose of cleaning and steaming the vessel's tanks to make her gas-free and ready for survey and repairs. Petitioner is, therefore, entitled to recover the crew's wages for this period in the stipulated amount of $16,687.72.

19. It was reasonable for petitioner to consume engine supplies during the period December 16, 1962 to December 29, 1962. Petitioner is, therefore, entitled to recover the cost of these supplies in the stipulated amount of $4,562.10.

20. It was reasonable for petitioner to consume deck supplies during the period December 16, 1962 to December 29, 1962. Petitioner is, therefore, entitled to recover the cost of these supplies in the stipulated amount of $182.40.

21. It was reasonable, in mitigation of damages, and otherwise, to divert the Sabine Sun in order to load and carry the ATLANTIC SUN's cargo. Petitioner is, therefore, entitled to recover the cost thereof in the amount of $31,772.44.

22. Charter hire allegedly lost to the ATLANTIC SUN by reason of the accident or collision does not constitute a recoverable item of damage.

23. Petitioner, Sun Oil Company, is entitled to damages in the total sum of $407,093.55, together with interest at the legal rate, to the date of judgment herein and costs reasonably incurred in this proceeding.

ORDER.

AND NOW, this 25th day of February, 1969, in accordance with the above Findings of Fact and Conclusions of Law, IT IS ORDERED that judgment be entered in favor of the petitioner, Sun Oil Company, and against the claimant, Humble Oil and Refining Company, in the amount of $407,093.55, together with interest thereon at the legal rate to the date hereof, and costs reasonably incurred.

E. MAC TROUTMAN, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,870

IN RE: PETITION OF SUN OIL COMPANY, AS OWNER OF TANK SHIP ATLANTIC SUN, FOR EXONERATION FROM AND LIMITATION OF LIABILITY

HUMBLE OIL AND REFINING CO, CLAIMANT,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 9, 1970

Before BIGGS, VAN DUSEN and ALDISERT, *Circuit Judges*

Reargued June 23, 1970

Before HASTIE, *Chief Judge*, and SEITZ and ALDISERT, *Circuit Judges*

OPINION OF THE COURT

(Filed October 2, 1970)

ALDISERT, *Circuit Judge*

Scattered on this record is the factual debris that remains when, unfortunately, two ships no not pass silently in the night. The collision on December 16, 1962, between the *SS Atlantic Sun* and the *SS Esso New York*, both loaded tankers, resulted in the filing of claims by the owners of both vessels. Following an extended trial, the district court determined that the *Sun* "did all that could reasonably and prudently be done, under the circumstances, to avoid the collision," and granted Sun Oil Company exoneration from liability. The *Esso* was held solely responsible and Humble Oil and Refining Company was assessed damages in the amount of $407,093.55. This appeal followed.

On the morning of the collision, the *Sun* was bound for the open sea, leaving the Delaware River channel and proceeding down the Delaware Bay on a constant course of 157°. The inbound *Esso* was proceeding up the Bay at a course varying between 350° and 003°, having navigated on the west side of the river channel opening in order to take aboard a river pilot at Lewes, Delaware. At approximately 0901, when the vessels were roughly three miles apart, the *Sun* detected the *Esso* on her radar. Her master concluded that the ships would pass safely starboard-to-starboard if the *Sun* maintained the 157° bearing. There was logic to the expectation of starboard-to-starboard passing: *Sun* was on a southeastward heading; *Esso* was coming from the west shore and was proceeding northwardly, making for the channel entrance.

By 0906 the vessels had closed to approximately one mile of each other. Radar observations by the *Sun* confirmed her earlier belief in the safety of a starboard-to-starboard passing, and subsequent visual sightings allegedly substantiated this belief. At 0906.2, however, the *Esso* began moving east of 360°, a movement presumably

designed to emphasize the pilot's belief that a port-to-port passing should be executed. This gradual shifting of course was observed by the *Sun*.

At 0907, the master of the *Sun*, deciding that a safe starboard-to-starboard passing was no longer possible due to the *Esso's* change of course, ordered a 10° right rudder in order to execute a port-to-port passing. Ten seconds later a 20° right rudder was ordered. Before these course changes were seen by those on the bridge of the *Esso*, however, the *Esso*, at 0907.2 or .3, began to check its right swing and come slowly left. By 0907.5, before *Esso's* right swing was entirely checked, it had reached a bearing of 010° which was perceptible to the *Sun*. Within the next thirty seconds the *Esso's* left rudder brought her to 008.4° but this 1.6° course change was not discernible to the *Sun*.

By 0908, therefore, the inbound *Esso* with engines full ahead was swinging left at 14.2 knots. The outbound *Sun* was swinging right at 11.7 knots, having moved 14° from its 157° bearing to 171°. At this time the *Sun* went hard right rudder and the *Esso* began hard left, and both vessels were *in extremis* and on a collision course. Approximately one minute later the *Sun* sounded her danger signal and ordered her engines full astern. Just prior to the collision the *Esso* also ordered her engines reversed, but even the prompt execution of the order was unavailing. At 0909.5 the vessels collided.

Suff Oil contends that prior to 0906.2 when the *Esso* commenced a 10° right swing, the *Sun's* master correctly concluded that the ships could have passed safely starboard-to-starboard; that the *Sun's* course change to the right was necessitated by the *Esso's* improper change of course from 360° to 010°; that even after *Esso's* right rudder the *Sun's* right rudder created a safe port-to-port passing situation; and that *Esso's* final hard left constituted the sole proximate cause of the collision.

Humble Oil argues that a safe starboard-to-starboard passing was never possible without earlier course changes. It insists that proper seamanship required the *Sun* to establish a port-to-port passing and to direct her course to *Esso's* stern; that the *Esso's* course change from 360° to 010° was justified as an attempt to create the correct passing pattern; that its subsequent hard left was executed not at 0908, but at 0907.3 before any perceptible course change by the *Sun;* and that this maneuver, putting the *Esso in extremis,* rendered any subsequent evasive tactics impossible. Humble concludes, more from dedicated advocacy than persuasive logic, that the sole cause of the collision was the *Sun's* failure to stay clear as required by the Inland Rules of the Road, Art. 19, 33 U. S. C. § 204, thus creating a situation in which each vessel found it necessary simultaneously to guess at the other's intentions. Alternatively, Humble urges that, assuming its negligence, the like negligence of *Sun* in the failure to change course earlier should have precluded *Sun's* right to recover.

Filing extensive Findings of Fact, a Discussion and Conclusions of Law, the district court resolved all critical doubts in favor of the *Sun.* It found that when the *Sun* first sighted the *Esso* on her radar at 0901 her master correctly concluded that there would be a safe starboard-to-starboard passing. It also found that the *Sun's* 10° and 20° right rudders (at 0907 and 0907.17) were necessitated by the *Esso's* swing to the right which began at 0906.2, and that had these respective courses been maintained the vessels would have been cleared for a port-to-port crossing at a distance of approximately 1500 feet.

It was determined that the *Sun* was at all material times proceeding "at a prudent and moderate rate of speed," and that the *Esso's* engines were full ahead and accelerating after picking up the pilot. The district court further found that *Esso* began her hard left rudder at 0908,

that by this time the *Sun* had come 14° to her right, from 157° to 171°, that this course change should have been observed by the *Esso*, and that the *Esso* should have and could have done precisely the opposite of what she did do: she should have executed a hard right rather than a hard left. In the words of the district court, "[t]he sole substantial cause of the collision was the *Esso New York's* left rudder when the vessels were clear for a safe port-to-port passing." As noted, the *Sun* was held blameless.

We have engaged in a painstaking review of the record in this case. Had we presided at the trial of this cause it is possible that the complex factual array would have led us to a different result. But in our role as an appellate tribunal, we are unable to say that the essential findings of the district court on the negligence of the *Esso* and the exoneration of the *Sun* were "clearly erroneous." Rule 52(a), FED. R. CIV. PRO. Although the evidence was not uncontradicted, it was sufficient to support the trial court's findings.

This court has carefully defined our role as an appellate court in reviewing factual findings of a trial court. In *Speyer v. Humble Oil and Refining Co.*, 403 F. 2d 766, 770 (3 Cir. 1968) we said:

> In reviewing the decision of the District Court, our responsibility is not to substitute findings we could have made had we been the fact-finding tribunal; our sole function is to review the record to determine whether the findings of the District Court were clearly erroneous, i.e., whether we are "left with a definite and firm conviction that a mistake has been committed."

This is consistent with the governing principles enunciated by the Supreme Court:

> While, of course, it would be our duty to correct clear error, even in the findings of fact, [plaintiff] has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of the evidence is not "clearly erroneous."

United States v. Yellow Cab Co., 338 U. S. 338, 342 (1949). And to the same effect is Mr. Justice Douglas' statement in *United States v. National Ass'n. of Real Estate Bd.*, 339 U. S. 485, 495-96 (1950):

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister case to actions which the District Court apparently deemed innocent. [citations omitted] We are not given those choices, because our mandate is not to set aside findings of fact "unless clearly erroneous."

Finally, we find no error in the allowance of damages for the expenses incurred in diverting another vessel to transport *Sun's* cargo to its destination, or in the award of interest—conceded by Humble to be discretionary—from the date of the collision. *See, e.g., Rugo Constr. Co. v. New England Foundation Co.*, 172 F. 2d 964, 967-68 (1 Cir., 1949); *O'Brien Bros. v. The Helen B. Morgan*, 160 F. 2d 502, 506 (2 Cir. 1947).

The judgment of the district court will be affirmed.

On this record Judge Seitz cannot accept as many of the findings and conclusions of the district court as does the majority. However, he concurs in the affirmance of the judgment below because there is a sufficient evidentiary basis for the conclusion of the district court that *Esso's* negligence was the sole proximate cause of the collision.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,870

IN RE: PETITION OF SUN OIL COMPANY, AS OWNER OF TANK SHIP ATLANTIC SUN, FOR EXONERATION FROM AND LIMITATION OF LIABILITY

HUMBLE OIL AND REFINING CO., CLAIMANT,
Appellant.

SUR PETITION FOR REHEARING.

Present: HASTIE, *Chief Judge*, SEITZ and ALDISERT,
Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

RUGGIERO ALDISERT,
Judge.

Dated: October 22, 1970

Judges Freedman, Van Dusen, Adams and Gibbons disqualified themselves from consideration of this case.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,870

IN RE: PETITION OF SUN OIL COMPANY, AS OWNER OF TANK SHIP ATLANTIC SUN, FOR EXONERATION FROM AND LIMITATION OF LIABILITY

HUMBLE OIL AND REFINING CO., CLAIMANT,
Appellant.

(D. C. No. 383 of 1963 in Admiralty)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HASTIE, *Chief Judge*, SEITZ and ALDISERT, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued and re-argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court, filed February 25, 1969, be, and the same is hereby affirmed, with cost taxed in favor of appellee.

ATTEST:

THOMAS F. QUINN,
Clerk.

October 2, 1970

Costs taxed in favor of appellee as follows:

Brief for appellee $1,079.79

COPY

Certified as a true copy and issued in lieu of a formal mandate on November 5, 1970.

Test: THOMAS F. QUINN,

Clerk, United States Court of Appeals for the Third Circuit.

TITLE 33 U. S. C. §§ 153-232.

Navigation Rules for Harbors, Rivers, and Inland Waters Generally.

STEERING AND SAILING RULES AND SIGNALS.

§ 201. Suggestion for ascertainment of risk of collision.

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist. June 7, 1897, c. 4, § 1, 30 Stat. 100.

§ 203. Steam vessels approaching, meeting, or passing one another; banks obstructing view; leaving dock (Art. 18).

Rule I. When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other.

But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other.

The foregoing only applies to cases where vessels are meeting end on or nearly end on, in such a manner as to involve risk of collision; in other words, to cases in which, by day, each vessel sees the masts of the other in a line,

or nearly in a line, with her own and by night to cases in which each vessel is in such a position as to see both the sidelights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course, or by night to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

204. Steam vessels crossing (Art. 19).

When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other. June 7, 1897, c. 4, § 1, 30 Stat. 101.

206. Vessel having right-of-way to keep course (Art. 21).

Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed. June 7, 1897, c. 4, § 1, 30 Stat. 101.

§ 207. Crossing ahead of vessel having right-of-way (Art. 22).

Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. June 7, 1897, c. 4, § 1, 30 Stat. 101.

HARD STBD RUDDER 9.58 171.0°

9.06 190.0°

8.60 215.0° 09

8.42 240.0° 09:09.5

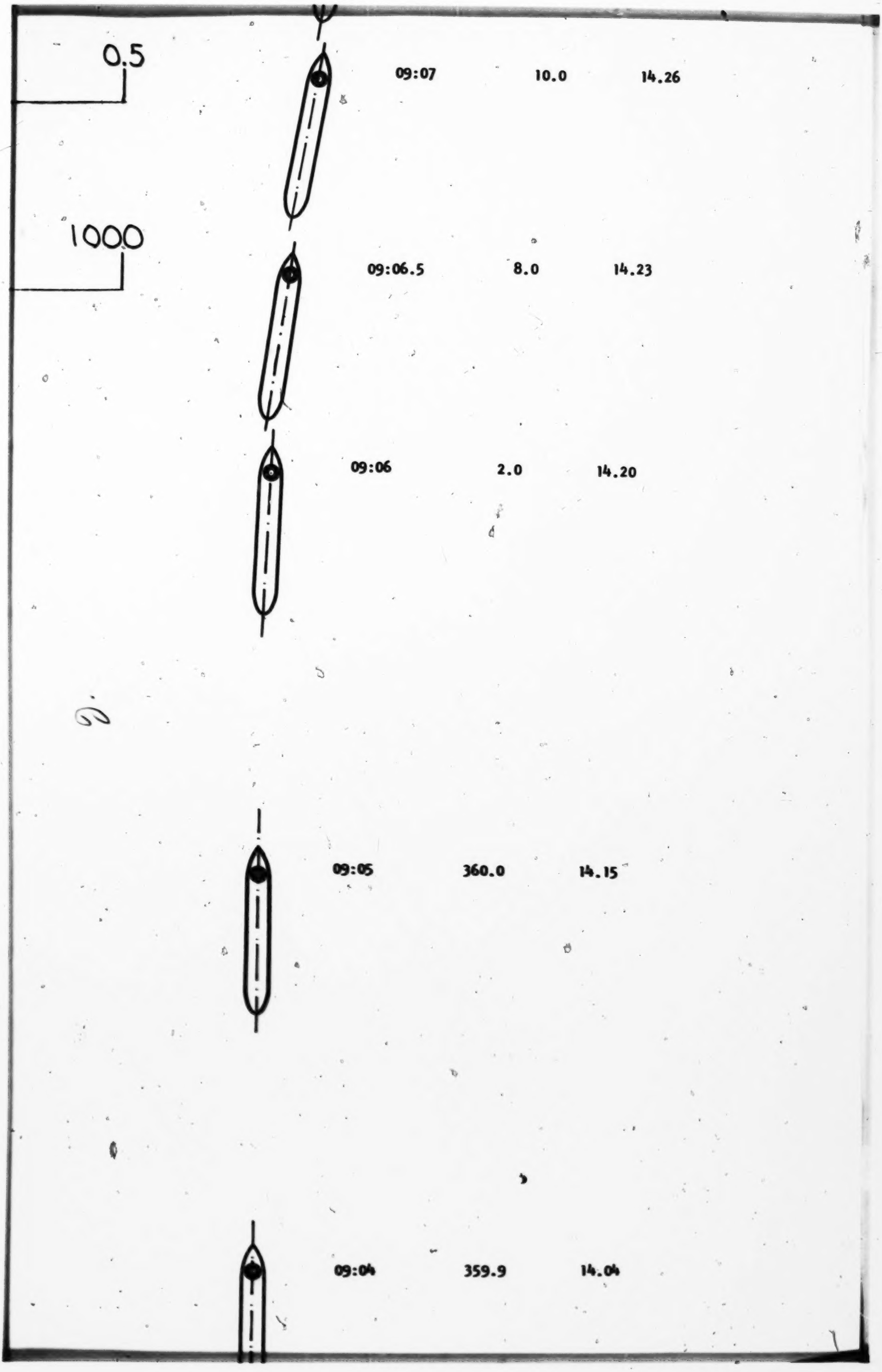
SCALE 1" = 350 FT.

NAUTICAL MILES

0 0.1 0.2 0.3 0.4

YARDS

0 100 200 300 400 500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09:07
10.0
14.26
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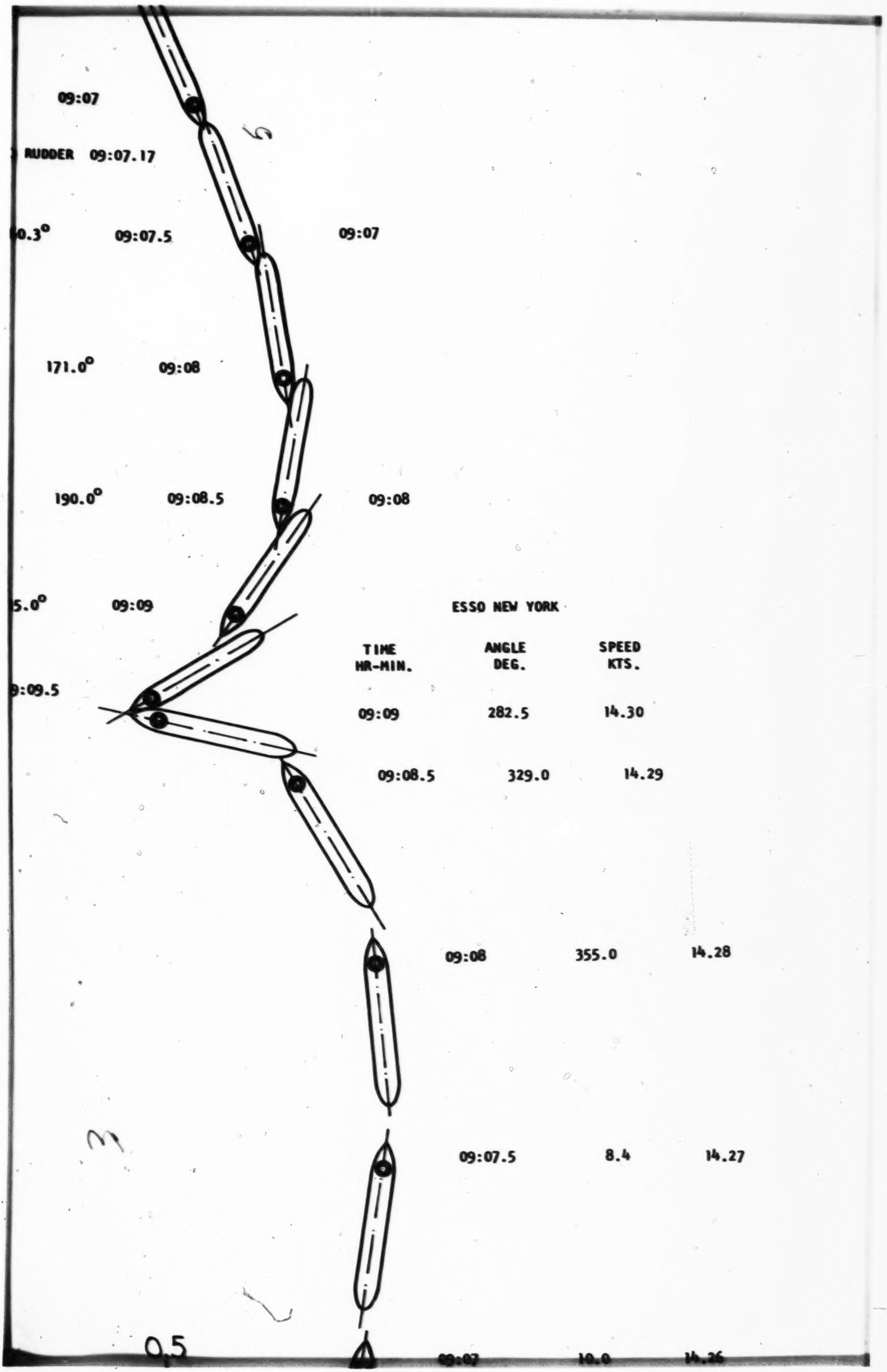
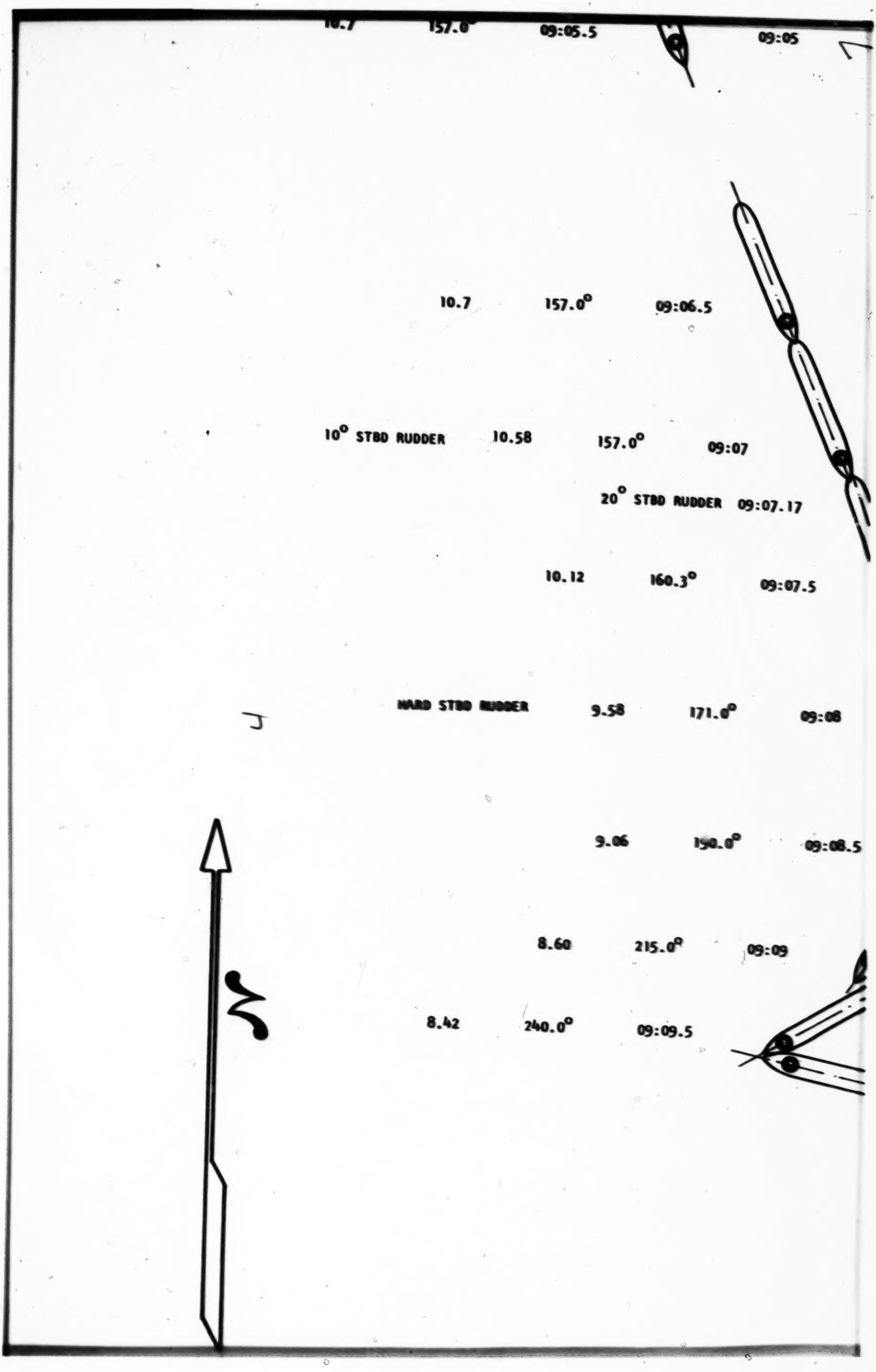
14.15
09:04
359.9
14.04


09:07
RUDDER 09:07.17
0.3°
09:07.5
09:07
171.0°
09:08
190.0°
09:08.5
09:08
5.0°
09:09
9:09.5
ESSO NEW YORK
TIME HR-MIN.
ANGLE DEG.
SPEED KTS.
09:09 282.5 14.30
09:08.5 329.0 14.29
09:08 355.0 14.28
09:07.5 8.4 14.27
09:07 10.0 14.26
0.5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10.7 157.0° 09:06.5
10° STBD RUDDER 10.58 157.0° 09:07
20° STBD RUDDER 09:07.17
10.12 160.3° 09:07.5
HARD STBD RUDDER 9.58 171.0° 09:08
9.06 190.0° 09:08.5
8.60 215.0° 09:09
8.42 240.0° 09:09.5

ATLANTIC SAIL

SPEED KTS.	ANGLE DEG.	TIME HR-MIN.		
10.7	157.6°	09:02.5		09:02
10.7	157.6°	09:03.5		09:03
10.7	157.6°	09:04.5		09:
10.7	157.6°	09:05.5		
10.7	157.6°			

09:05
09:04.5
09:04
157.6°
09:05.5
09:05
10.7
157.6°
09:06.5
09:06
STBD RUDDER
10.58
157.6°
09:07
20° STBD RUDDER 09:07.17
10.12
160.3°
09:07.5
09:07

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1253.

HUMBLE OIL & REFINING COMPANY,
Petitioner,

v.

SUN OIL CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit was docketed on January 20, 1971. A Brief in Opposition was filed on February 17, 1971. Respondent's persistent use of misleading terminology requires a reply since its very argument underscores the errors committed below. An otherwise uncomplicated maritime factual and legal situation becomes, in Respondent's hands, one of confusion with the studied substitution of facts that might have been for the legal obligations imposed on these vessels by reason of their original relationship to each other.

ARGUMENT.

The principal error in Respondent's brief and the lower courts' opinions is the articulation of land oriented reasoning which, although seemingly logical, has no application to a maritime casualty governed by navigation rules.

Respondent relies on the trial court's determination that at about 0606, when the SUN first saw the ESSO NEW YORK, the vessels were so far to the starboard of each other, that a starboard to starboard passing was safe and practicable (Respondent's brief pp. 5, 8). To an observer on shore, unfamiliar with the governing maritime principles, the above statement has an element of logic, i.e., the vessels' intersecting courses, which were not at right angles, would at some later point perhaps allow them to "pass" and place them in a position where they would be starboard to starboard. On a highway or in a narrow channel automobiles or vessels may be on intersecting courses and eventually pass port to port or starboard to starboard due to the physical limitations imposed to either side—the configuration of the highway or channel eventually bringing them to the "head and head" or "end on" situation where each keeps to one side or the other. Nevertheless, such reasoning has no application to the relatively open waters involved in this collision. Automobiles traveling on separate but intersecting highways can only collide at the point where the highways intersect, a point generally provided with traffic controls. However, vessels traveling in open waters, but on intersecting courses, can collide at an infinitesimal number of points depending on the many possible changes in the course and/or speed of either or both vessels.

In order to prevent vessels on intersecting courses from colliding, the navigation rules provide certain definitive obligations which must be followed. In regulating the approach of two vessels to each other, except when both are

proceeding in the same direction, the rules describe only two types of encounters: "meeting" and "crossing". The term "passing", one of the apparent bases for the lower courts' confusion, may be used interchangeably with the term "meeting", but should never be used to describe a "crossing" situation because of the different obligations imposed on each vessel, which duties have been enunciated in the petition.

Respondent's brief attempts to dispose of Petitioner's arguments concerning the lower courts' clear errors of law by contending Petitioner seeks a third review of the facts. The fallacy in this argument is clearly shown by Petitioner's adoption of SUE's own exhibit, P-28, and the testimony of its expert who prepared it. As was apparent to Mr. Suarez in that portion of his testimony presented at page 4 of the petition, these vessels were on intersecting or crossing courses at the time they began to navigate with respect to each other. Respondent's erroneous reliance on cases discussing intersecting angles between vessels meeting in narrow channels (p. 10), or the mistaken beliefs of SUE's crew respecting the course of Esso, cannot change the uncontradicted evidence of SUE's own expert that these vessels were crossing.

Contrary to Respondent's contention on page 16 of its brief, a court's erroneous review of the uncontested facts and its complete failure to apply the governing law must always be a basis for review by this Honorable Court. Moreover, the error goes deeper. It is a factual determination substituted for a legal determination—a non-maritime description of events instead of a legal analysis of the controlling law. Both Respondent and the lower courts adopt their own characterization of the ships' courses rather than adhering to the mandates of the rules. As such, the error is one of law; therefore, Respondent's argument

that Petitioner is seeking a review of the facts is misplaced. Certainly such errors do not become inviolable because sanctioned by a higher court and opposing counsel. Instead, the errors acquire a greater significance which must be corrected before lower courts and, more importantly, navigators compound them.

The "crossing" rule is designed so that every navigator, including weekend sailors, will not be required to make close approximations of courses, distances, and speeds. His conduct should not be burdened by time consuming calculations which might cause dangerous hesitation in performing his duty. Rather, with immediate reference to the rule he can distinguish the aspect of his vessel to the other and be guided accordingly—either holding his course and speed or staying out of the way.

SUN's obligation from first visual sighting was to stay out of the way. She admittedly intended to cross ahead of Esso without regard for her required duties and only belatedly took any avoiding action. She must necessarily be held at fault for committing such statutory breaches.

CONCLUSION.

For the foregoing reasons and those set forth in the petition, it is respectfully submitted that a petition for a writ of certiorari be granted.

Respectfully submitted,

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RAYMOND T. LETULLE,
Counsel for Petitioner.